(10)

No. 22-121-ORG
Status: GRANTED

Title: State of Louisiana, Plaintiff
v.
State of Mississippi, et al.

Docketed:
August 6, 1993

Counsel for petitioner: Keyser,Gary L.

Counsel for respondent: Moore,Michael, Bailess,Robert R., Fox Jr.,George F., Jefferson,Archie L., Nuff,William F., Baker Jr.,Hines H.

Entry	Date	Note	Proceedings and Orders
1	Aug 6 1993	D	Application (A93-128) for a stay of proceedings in United States District Court, submitted to Justice Scalia.
2	Aug 6 1993	P	Motion for leave to file and bill of complaint filed.,
3	Aug 24 1993		The State of Mississippi, et al. are invited to file responses to Louisiana's motion. Due September 8, 1993. (See letter dated August 24, 1993)
4	Sep 8 1993		Response of Julia Donelson Houston, et al. to the motion of the State of Louisiana for stay of proceedings filed.
5	Sep 20 1993		Application (A93-128) referred to the Court by Justice Scalia.
7	Oct 4 1993		Application (A93-128) denied by the Court.
8	Oct 4 1993		Response of Mississippi filed.
9	Oct 4 1993		Response of Houston Group filed.
10	Oct 6 1993		DISTRIBUTED. October 29, 1993.
11	Nov 1 1993		The motion for leave to file a bill of complaint is granted. Defendants are allowed thirty days within which to file answers.
12	Dec 1 1993		Answer of Mississippi filed.
13	Dec 1 1993		Answer of the private defendants filed.
14	Dec 1 1993		Motion of Mississippi for leave to file a counterclaim filed.
15	Jan 10 1994		ORDER: The motion of Mississippi for leave to file counterclaim is granted. Plaintiff is allowed thirty days within which to file an answer.
16	Feb 7 1994		Answer of plaintiff Louisiana to counterclaim of Mississippi filed.
17	Mar 7 1994		ORDER: It is ordered that the Honorable Vincent L. McKusick, Retired Chief Justice, Supreme Judicial Court of Maine, be appointed Special Master in this case with authority to fix the time and conditions for the filing of additional pleadings and to direct subsequent proceedings, and with authority to summon witnesses, issue subpoenas, and take such evidence as may be introduced and such as he may deem it necessary to call for. The Special Master is directed to submit such reports as he may deem appropriate. The compensation of the Special Master, the allowances to him, the compensation paid to his legal, technical, stenographic, and clerical assistants, the cost of printing his report and all other proper expenses, including travel expenses, shall be charged against and be borne by the parties in such proportion as the Court may hereafter direct.

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No. 22-121-ORG

Entry	Date	Note	Proceedings and Orders
18	Mar 18 1994		Oath of Special Master received.
19	Aug 16 1994		Motion of the Houston Defendants for leave to file supplemental answer.
20	Aug 16 1994		DISTRIBUTED. September 26, 1994.
21	Oct 3 1994		ORDER: The motion of Houston defendants for leave to file a supplemental answer is granted.
22	Oct 24 1994		Report of the Special Master received.
23	Nov 14 1994		The Report of the Special Master is received and ordered filed. Exceptions to the Report, with supporting briefs, may be filed by the parties within 45 days. Reply briefs, if any, may be filed by the parties within 30 days.
24	Jan 13 1995		Time for filing exceptions to Report of Special Master extended for all parties to and including January 13, 1995.
26	Jan 13 1995		Exceptions of Louisiana to Report of Special Master and Petition for New Trial filed.
27	Jan 13 1995		Waiver of Mississippi to file exceptions filed. (NP)
28	Jan 17 1995		Waiver of the Houston Group to file exceptions filed. (NP)
29	Feb 6 1995		Time to file reply to Exceptions of Louisiana extended to and including February 22, 1995.
31	Feb 15 1995		Exceptions DISTRIBUTED (March 3, 1995).
30	Feb 22 1995		Reply of Mississippi, et al. filed.
32	Mar 6 1995		The Exceptions of Louisiana to the Report of the Special Master are set for argument in due course.
33	Aug 1 1995		SET FOR ARGUMENT TUESDAY, OCTOBER 3, 1995. (1ST CASE).
34	Aug 4 1995		CIRCULATED.
35	Aug 24 1995	P	Motion of defendants Mississippi, et al. for divided argument filed.
36	Sep 13 1995		ORDER: Motion of defendants for divided argument GRANTED.
37	Oct 3 1995		ARGUED.

Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

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No. ___ Original

In The

Supreme Court of the United States

October Term, 1993

STATE OF LOUISIANA,

Plaintiff,

v.

STATE OF MISSISSIPPI, et al.,

Defendants.

MOTION TO FILE COMPLAINT, COMPLAINT AND BRIEF IN SUPPORT OF MOTION AND COMPLAINT

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No. ___ Original

In The

Supreme Court of the United States

October Term, 1993

STATE OF LOUISIANA,

Plaintiff,

v.

STATE OF MISSISSIPPI, et al.,

Defendants.

MOTION FOR LEAVE TO FILE COMPLAINT

The State of Louisiana, appearing herein through the Honorable Richard P. Ieyoub, its Attorney General, acting in pursuance of the authority and powers vested in him by Article IV, Section 8 of the Louisiana Constitution, respectfully shows the Court that this filing represents its third motion for leave to file a bill of complaint in this matter, and states that:

1. A portion of the boundary between the States of Louisiana and Mississippi common to the Parish of East Carroll, Louisiana, and the County of Issaquena, Mississippi, is in dispute.

2. This boundary dispute between the States is subject to the exclusive original jurisdiction of the Supreme Court of the United States.

3. An action is presently and has for a number of years been pending in the United States District Court, Western Division of the Southern District of Mississippi, entitled *Julia Donelson Houston, et al, vs. Ruth M. Thomas, et al.*, Civil Action No. W86-0080(B), wherein complainants in said civil action are claiming ownership of a portion of lands involved in this boundary dispute, contrary to the continued assertion of jurisdiction, dominion and control of said area by the State of Louisiana under its inherent sovereignty.

4. The above referenced action is styled as a Complaint To Remove Cloud and identifies numerous plaintiffs as the owners in fee simple of a certain tract of land purportedly lying in Mississippi, as against numerous defendants as residents and domiciliaries of the State of Louisiana. In fact, the land claimed by plaintiffs is within the historic boundaries of Louisiana and a part of the Louisiana mainland.

5. Complainants in the district court recite their title as having derived from patents of the United States of America and subsequently recorded in Mississippi.

6. Complainants allege Stack Island was affected by the divided flows of the Mississippi River into the natural erosion and accretion processes of the river, gradually migrating southward and westward.

7. The State of Louisiana and the Lake Providence Port Commission, a political subdivision of the state, intervened in the federal district court action in June, 1987, asserting that their rights arise under the Constitution of the United States and an Act of Congress approved April 8, 1812, admitting the State of Louisiana into the Union of the United States of America, which act

is found at 2 Stat 701 (U.S. Statutes at Large, Vol. 2, chap. 50, p. 701).

8. Thereafter on September 15, 1988, the State of Louisiana moved for leave to file a bill of complaint pursuant to Article III, Section 2 of the United States Constitution and 28 U.S.C. § 1251(a), granting to this Court original and exclusive jurisdiction of all controversies between two states. On December 12, 1988, this Court denied the motion of Louisiana to file an original action in No. 114, Original.

9. On February 2, 1989, the State of Louisiana filed a petition for re-hearing on its motion to file a bill of complaint, and an alternative motion to file a separate new bill of complaint. On February 27, 1989, this Court denied the petition for re-hearing and alternative motion to file a separate complaint in No. 114, Original.

10. Following these actions, Louisiana was left with no alternative but a trial in the district court. Subsequently, the case was completely tried in a bifurcated trial in the federal district court in Mississippi in two separate trial fixings, with the trial court rendering two separate bench opinions and two separate judgments. Thereafter, the Fifth Circuit reversed and rendered, entering judgment in favor of the State of Louisiana and the Lake Providence Port Commission, an entity and political subdivision of the State.[1]

11. This Court granted the petition for Writ of Certiorari of the State of Mississippi and the original

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[1] Houston v. Thomas, 937 F.2d 247 (5th Cir.1991)

complainants on March 23, 1992[2]. The case was argued November 9, 1992, and decided December 14, 1992,[3] the Court remanding it to the Court of Appeals with regard to further proceedings as to claims of title. The Court made no ruling on the merits, except as to the jurisdictional issue, and made no mention of the fact that most of the riparian lands at issue on the Louisiana side of the river had been deeded prior to the trial by quit claim of the Louisiana riparians to the Lake Providence Port Commission, an entity and political subdivision of the State of Louisiana. Thus, the majority of the lands at issue are owned by Louisiana, and as between the State of Louisiana and the State of Mississippi, the District Court has no jurisdiction to hear the case remanded to it by the Court of Appeals on February 12, 1993.[4] Some of the lands remain in private ownership, and both the state-owned and privately-owned riparian lands on the Louisiana side of the river are claimed by the original complainants. The boundary remains unresolved.

12. It will do no good for the district court to attempt to adjudicate a boundary involving the claims of the private parties, as suggested by this Court, and the district court recognized this in a June 10, 1993, status conference resulting in the order attached as Exhibit "A". It quite correctly stated, in part, that:

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[2] Mississippi, et al. v. Louisiana, et al., No. 91-1158, 112 S.Ct. 1472 (1992).

[3] Mississippi, et al. v. Louisiana, et al., ___ U.S. ___, 113 S.Ct. 549, 121 L.Ed.2d 466 (1992).

[4] Houston, et al. v. Thomas, et al., 984 F.2d 642 (5th Cir.1993).

> Since the stakes are substantial to the parties and since the Defendants are political entities of the State of Louisiana, the attorney for the Port Authority requested the Court to stay further action in this case to give the State of Louisiana time to file a Motion in the Supreme Court requesting that court to exercise its original jurisdiction under Article III, Section 2 of the Constitution to decide the state location question. Such a decision would solve the choice of law problem for the Court, would expedite the ultimate resolution of the controversy, and would be the fairest method of resolving the fundamental issue for all parties.

13. This action is now in nearly identically the same posture as when originally commenced by private plaintiffs suing other private defendants in the District Court for the Southern District of Mississippi over certain land riparian to the Mississippi River on the Louisiana side (1986). The State of Louisiana is still seeking to determine its true legal boundary with the State of Mississippi in the vicinity of the disputed lands. Now, however, the district court cannot decide the boundary question and, as a consequence, cannot resolve the choice of law problem.

14. The land at issue lies along and constitutes a substantial portion of the west bank of the Mississippi River adjacent to Lake Providence, Louisiana. The Mississippi interests, known as the Houston Group, allege that they own the land as a result of a homestead patent issued by the United States in 1888 and a deed issued by Mississippi in 1933 to a 117.96 acre island. Louisiana and the Lake Providence Port Commission dispute these claims and seek a determination of the correct legal boundary between the two states, asserting that the area

claimed by petitioners is nothing but ordinary accretion to the bank.

WHEREFORE, the State of Louisiana respectfully prays that this Honorable Court take original jurisdiction and grant to plaintiff, State of Louisiana, leave to file its complaint in this Court, and that this Honorable Court issue an order directed to the United States District Court, Western Division of the Southern District of Mississippi, placing in abeyance all proceedings in the action entitled, *Julia Donelson Houston, et al. vs. Ruth M. Thomas, et al.*, Civil Action No. W86-0080(B), pending the conclusion and determination of the matter set forth in this Complaint, and further prays for such orders and process as the Court may deem proper in pursuance of the annexed complaint and application for order.

Respectfully submitted,

RICHARD P. IEYOUB
Attorney General
State of Louisiana

JACK E. YELVERTON
First Assistant Attorney General
State of Louisiana

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No. ___ Original

In The

Supreme Court of the United States

October Term, 1993

STATE OF LOUISIANA,

Plaintiff,

v.

STATE OF MISSISSIPPI, et al.,

Defendants.

COMPLAINT

The State of Louisiana, appearing herein through the Honorable Richard P. Ieyoub, its Attorney General, acting pursuant to the authority and powers vested in him by Article IV, Section 8 of the Louisiana Constitution, institutes this original action against the State of Mississippi, and makes party hereto the following citizens of the State of Mississippi, namely, Julia Donelson Houston, Ruth Houston Baker and Hines H. Baker, Jr., Co-Executors and Co-Trustees of the Estate of George T. Houston, a/k/a George T. Houston, III, deceased, adult residents and citizens of Mississippi, and Ruth Houston Baker, individually, an adult domiciled in Harris County, Texas, and for its cause of action, states:

I.

The original jurisdiction of this Court is invoked under Article III, Section 2, Clause 2 of the Constitution of the United States and Par. (a) Section 1251, Title 28, United States Code Annotated.

II.

The State of Louisiana was admitted into the Union of the United States of America by the Act of Congress found in chapter 50 of the United States Statutes at Large, vol. 2, page 701, approved April 8, 1812, and therein the boundaries of the said State of Louisiana, in the preamble of said Act, were described as follows:

"Whereas, the representatives of the people of all that part of the territory or country ceded, under the name of 'Louisiana' by the treaty made at Paris, on the thirtieth day of April, one thousand eight hundred and three (8 Stat. at L. 200), between the United States and France, contained within the following limits, that is to say: 'Beginning at the mouth of the river Sabine; thence, by a line drawn along the middle of said river, including all islands, to the thirty-second degree of latitude; thence due north to the northernmost part of the thirty-third degree of north latitude; thence along the said parallel of latitude to the river Mississippi; thence down the said river to the river Iberville; and from thence along the middle of the said river and lakes Maurepas and Pontchartrain, to the gulf of Mexico; thence bounded by the said gulf to the place of beginning, including all islands within three leagues of the coast. . . . ' "

III.

By the Act of Congress found in the United States Statutes at Large, vol. 2, p. 708, chap. 57, approved April 14, 1812, additional territory was added to the then-existing State of Louisiana, which additional territory was described in the following language:

"Beginning at the junction of the Iberville with the river Mississippi; thence, along the middle of the Iberville, the river Amite, and of the lakes Maurepas and Pontchartrain to the eastern mouth of the Pearl River; thence up the eastern branch of Pearl River to the thirty-first degree of north latitude; thence along the said degree of latitude to the river Mississippi; thence down the said river to the pace of beginning, shall become and form a part of the said state of Louisiana. . . . "

IV.

The territory lying adjacent to, and to the eastward of the state of Louisiana, is the State of Mississippi, which latter state was admitted into the Union of the United States of America by the Act of Congress, approved March 1, 1817, 3 Stat 348 (U.S. Statutes at Large, vol. 3, chap. 23, page 348), whereby the inhabitants of the western part of the then-Mississippi territory were authorized to form for themselves a state constitution and to be admitted into the Union, the boundaries of the then-to-be-created state being described as follows:

"Beginning on the river Mississippi at the point where the southern boundary line of the State of Tennessee strikes the same; thence east along the said boundary

line to the Tennessee River; thence up the same to the mouth of Bear Creek; thence by a direct line to the northwest corner of the county of Washington 'Alabama'; thence due south to the gulf of Mexico; thence westwardly, including all the islands within six leagues of the shore to the most eastern junction of Pearl River with Lake Borgne; thence up said river to the thirty-first degree of north latitude; thence west along the said degree of latitude to the Mississippi River; thence up the same to the beginning."

V.

The effect of this legislation, as to the eastern boundary of the State of Louisiana, was to retain the channel or thread, sometimes known as the thalweg, of the Mississippi River as the original eastern boundary, as far south as the 31st degree of north latitude. Such original eastern boundary from the northeast tip of the State of Louisiana to said 31st degree of north latitude is common with the State of Mississippi.

VI.

Under the law of Louisiana, the State of Louisiana owns the bed of the Mississippi River to the boundary line of the States of Louisiana and Mississippi. Under the law of the State of Mississippi, the riparian owner owns to the boundary line between said states. This Supreme Court of the United States has original jurisdiction of suits to determine the boundaries between states, and of parties adversely asserting title to the property of a state.

VII.

Until recently the primary interest in the determination of the exact boundary line in the Mississippi River between the two states has been as to navigation and fishing rights, and to masses of land where an avulsion has taken place.

VIII.

On the 29th day of July, 1986, there was filed in the United States District Court, Western Division of the Southern District of Mississippi, a complaint entitled *Julia Donelson Houston, et al. v. Ruth M. Thomas, et al.*, Civil Action No. W86-0080(B). This Complaint To Remove Cloud filed against Louisiana residents and attacking the ownership of property of the State of Louisiana, raises the issue in this case as to the true location of the boundary between the States of Louisiana and Mississippi common to the Parish of East Carroll, Louisiana, and the County of Issaquena, Mississippi.

IX.

In the said action presently pending in the United States District Court as aforesaid, complainants claim ownership of a portion of lands involved in this boundary dispute contrary to the continued assertion of jurisdiction, dominion and control of said area by the State of Louisiana under its inherent sovereignty.

X.

The above referenced action filed herein is styled as a Complaint To Remove Cloud and identifies numerous

plaintiffs as the owners in fee simple of a certain tract of land purportedly lying in Mississippi, as against numerous defendants as residents and domiciliaries of the State of Louisiana.

XI.

Complainants in the district court recite their title as having derived from patents of the United States of America and subsequently recorded in Mississippi.

XII.

Complainants allege that Stack Island was affected by the divided flows of the Mississippi River into the natural erosion and accretion processes of the river, gradually migrating southward and westward.

XIII.

The State of Louisiana and the Lake Providence Port Commission, a political subdivision of the state, intervened in the federal district court action in June, 1987, asserting that their rights arise under the Constitution of the United States and an Act of Congress approved April 8, 1812, admitting the State of Louisiana into the Union of the United States of America, which act is found at 2 Stat 701 (U.S. Statutes at Large, Vol. 2, chap. 50, p. 701).

XIV.

The original complainants responded to the intervention and thereafter the State of Louisiana and the Lake Providence Port Commission filed a Third-Party Complaint against the State of Mississippi. The State of Mississippi answered the Third-Party Complaint.

Thereafter, the case followed the course set forth in detail in paragraphs 8 through 12 of the attached motion for leave to file a bill of complaint, having been rejected by this Court twice on earlier motions for original jurisdiction, then tried, appealed and heard on certiorari. This action is now in nearly identically the same posture as when originally commenced by private plaintiffs suing other private defendants in the District Court for the Southern District of Mississippi. The State of Louisiana is still seeking to determine its true legal boundary with the State of Mississippi in the vicinity of the disputed lands, which it owns.

XV.

The real question in dispute between plaintiff and defendants is the true location of the boundary line between the State of Louisiana and the State of Mississippi, which is dependent upon a determination of the location of both a frozen thalweg and the live thalweg, which follows the course of the Mississippi River itself as its bed and channel move with the gradual processes of accretion and erosion.

XVI.

However, the determination of this river boundary also involves an interpretation of the acts of Congress

setting forth the boundaries and determination of the boundaries between said two states, as well as the equal footing doctrine applicable to the states of the United States.

XVII.

Further, the Treaty of Peace concluded between the United States and Great Britain, September 3, 1783, 8 Stat 80, is also involved in this controversy, including an interpretation thereof as it affects or may affect such boundary between the State of Mississippi and the State of Louisiana, which can only be made pursuant to the Constitution of the United States and federal law.

XVIII.

Consequently, in the necessary and essential exercise of sovereign rights, the exact location of the boundary line between Mississippi and Louisiana in the area at controversy becomes of major and substantial significance to the respective states, in view of the great value of the lands and water bottoms for navigational, hunting, fishing, timber and recreational purposes, as well the potential for the production of oil, gas and other minerals. Heretofore, it has not been necessary to determine with preciseness the exact location of such boundary line. This controversy now makes such a determination essential to the two sovereign states, as well as to their citizens.

XIX.

The property rights, the sovereign rights and the sanctity of the boundary between the States of Louisiana and Mississippi are inextricably involved in the litigation which commenced this controversy, thus instituted and pending in the United States District Court for the Western Division of the Southern District of the State of Mississippi, and said Court is not the forum proper to such determinations. Nor is the State of Louisiana required to submit its title to said Court, nor should it be.

XX.

The decision of the Supreme Court of the United States herein will be conclusively binding on all private parties and it alone has the power to fix and determine the boundary lines herein described. The suit of *Julia Donelson Houston, et al. vs. Ruth M. Thomas, et al.* should be stayed by Order of this Court until a final judgment herein can be had, and application is hereby made by the State of Louisiana for an Order to be issued by this Court, directed to the United States District Court, Western Division of the Southern District of Mississippi, staying all proceedings in said suit.

XXI.

The jurisdiction of the Supreme Court of the United States in boundary disputes between States is exclusive and original and, accordingly, it is appropriate that the suit of *Julia Donelson Houston, et al. vs. Ruth M. Thomas, et al.*, be stayed and all parties thereto be served with a copy

of the Stay Order herein applied for, and be given the opportunity to assert such interests as they may have in this action.

WHEREFORE, PREMISES CONSIDERED, Complainant prays:

1. That process issue herein to all parties as required by law.

2. That an order be issued promptly to the United States District Court for the Western Division of the Southern District of the State of Mississippi, staying any further proceedings in the suit of *Julia Donelson Houston, et al. vs. Ruth M. Thomas, et al.* C.A. No. W86-0080(B), on the docket of said Court, until final judgment has been rendered herein or until further order of this Court.

3. That, on final hearing hereof, the eastern boundary line of the State of Louisiana at its juncture or coterminous location with the western boundary line of the State of Mississippi in the vicinity of the navigable channel of the Mississippi River, common to the Parish of East Carroll, Louisiana and the County of Issaquena, Mississippi, should be fixed, recognized and determined.

4. That the claim of title asserted by Julia Donelson Houston, et al., in and to the lands and water bottoms described herein be herewith cancelled and forever held for naught.

And for such order and further relief, general or special, as may be proper.

Respectfully submitted,

RICHARD P. IEYOUB
Attorney General
State of Louisiana

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First Assistant Attorney General
State of Louisiana

E. KAY KIRKPATRICK
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August 5, 1993

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BRIEF OF THE STATE OF LOUISIANA IN SUPPORT OF ITS MOTION FOR LEAVE TO FILE ORIGINAL SUIT

OPENING STATEMENT

As set forth in the Motion for Leave to File Complaint annexed herein filed by the State of Louisiana, the proposed suit involves a determination of the exact location of a portion of the eastern boundary line of the State of Louisiana common with the State of Mississippi and the cancelling of the claims of certain named private parties to property rights of the State of Louisiana under the bed of the Mississippi River, as well as to accreted lands on and a part of the west bank, and to a land formation known as Stack Island.

I.

JURISDICTION OF SUITS BETWEEN STATES

The Supreme Court of the United States has exclusive original jurisdiction of all controversies between states. As set forth in Clause 2, Sec. 2, Article III of the Constitution:

> "In all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be a party, the Supreme Court shall have original jurisdiction."

As set forth in Section 1251, Title 28, U.S.C.A. (a);

> "(a) The Supreme Court shall have original and exclusive jurisdiction of all controversies between two or more states."

II.

THE MOTION FOR LEAVE TO FILE SHOULD BE GRANTED

Jurisdiction vests since this is a suit between the States of Louisiana and Mississippi in which private persons are also proper parties due to the nature of the boundary dispute.

The value of the property involved is great. The rights of the State of Louisiana are real and substantial. The controversy exists and is justiciable. The Supreme Court of the United States is the only forum to settle this dispute, fix the boundary line between the states, and determine finally the rights of the parties. See *Florida v. Georgia*, 17 How. 478 (1854); *Oklahoma v. Texas*, 258 U.S. 574, 66 L.Ed. 771, 42 S.Ct. 409 (1922); *California v. Arizona*, 440 U.S. 59, 63, 99 S.Ct. 919, 922, 59 L.Ed.2d 144 (1979).

This court has entertained jurisdiction in such controversies on numerous occasions, and has done so in several prior Mississippi River boundary cases between Louisiana and Mississippi, as in *Louisiana v. Mississippi*, 202 U.S. 1, 50 L.Ed. 913, 26 S.Ct. 408 (1906); *Louisiana v. Mississippi*, 282 U.S. 458, 75 L.Ed. 459, 51 S.Ct. 197 (1931); and *Louisiana v. Mississippi*, 384 U.S. 24, 16 L.Ed.2d 330, 86 S.Ct. 1250 (1966).

The Court has held very recently, in this same case, that "the uncompromising language of 28 U.S.C. § 1251(a), * * * gives to this Court 'original and *exclusive* jurisdiction of all controversies between two or more States' (emphasis added)." *Mississippi, et al. v. Louisiana, et*

al., ___ U.S. ___, 113 S.Ct. 549, 553, 121 L.Ed.2d 466 (1992). Thus, the District Court was deprived of jurisdiction over Louisiana's third-party complaint against Mississippi. Though § 1251(a) is phrased in terms of a grant of jurisdiction to this Court, the plain meaning of "exclusive" necessarily denies jurisdiction of such cases to any other federal court. See, *e.g.*, *California v. Arizona, supra*. Therefore, the question of jurisdiction in this particular case has been put to rest: it is with this Court, and no other.

III.

POWER TO STAY

In the aid of its original jurisdiction, the Supreme Court has the power and authority to issue stays not only inherently but also by Sec. 1651(a), Title 28 U.S.C.A., which reads:

> "(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

See *Ex Parte Republic of Peru*, 318 U.S. 578, 87 L.Ed. 1014, 63 S.Ct. 793 (1943).

As stated in *Landis v. North American Co.*, 299 U.S. 248, 81 L.Ed. 159, 57 S.Ct. 163 (1936):

> "Apart, however, from any concession, the power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants."

The Court has exercised its power to stay proceedings in other Mississippi River boundary cases, as in the recent case of *Louisiana v. Mississippi*, 466 U.S. 96, 80 L.Ed.2d 74, 104 S.Ct. 1645 (1984), and should so issue a stay in this case.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION

JULIA DONELSON HOUSTON, ET AL. PLAINTIFFS

VS. CIVIL ACTION NO. W86-80B

RUTH M. THOMAS, ET AL. DEFENDANTS

ORDER

(Filed June 11, 1993)

A Rule 16 status conference was held in this case on June 10, 1993, and was attended by Honorable Robert R. Bailess for the Plaintiffs and Honorable Calvin Adams, Jr. for the Fifth Louisiana Levee District. Honorable Gary L. Keyser for the Lake Providence Port Commission and other Defendants participated by telephone.

The Court discussed with the attorneys the opinion of the Supreme Court which reversed and remanded the case to the Circuit Court of Appeals for the Fifth Circuit which remanded to this Court. All parties agreed that since the rights of the parties to the land are controlled by state law and because there are substantial and material difference in the laws of Louisiana and Mississippi as they affect the issues in this case, that it will be necessary for this Court to determine whether the land lies in Louisiana or Mississippi.

The Court notes that earlier at trial it found that the land in question is a part of Mississippi but that the Fifth Circuit reversed this Court. The Supreme court granted certiorari on this question *inter alia* but did not rule on the

question, instead ruling that this Court was without jurisdiction to decide the state location question as it affected the states as parties. The Supreme Court held that this Court has jurisdiction to decide the state location question for purposes of deciding the ownership question as among the private parties.

It is thus unclear to this Court as to whether it should again make a determination of state location question, rely on its earlier determination of this question, or follow the opinion of the Fifth Circuit as the law of the case. The Court notes that if it follows the last option, the Plaintiffs were granted certiorari by the Supreme Court on the question but did not obtain a review. The Court further notes that under any of its options, any decision it makes could be rendered inequitable if the Supreme Court later decides to determine the state location question as a matter of its original jurisdiction.

Since the stakes are substantial to the parties and since the Defendants are political entities of the State of Louisiana, the attorney for the Port Authority requested the Court to stay further action in this case to give the State of Louisiana time to file a Motion in the Supreme Court requesting that court to exercise its original jurisdiction under Article III, Section 2 of the Constitution to decide the state location question. Such a decision would solve the choice of law problem for this Court, would expedite the ultimate resolution of the controversy, and would be the fairest method of resolving the fundamental issue for all parties.

Accordingly, all proceedings in this case are hereby stayed until August 2, 1993, to provide ample time for the

State of Louisiana to file its motion with the Supreme Court. The parties shall advise this Court by August 2, 1993, as to whether the motion has been filed and, if so, whether it has been granted or when a ruling might be expected. This report may be in simple letter form with a copy to the Clerk of Court for filing. If the Supreme Court accepts the state location question for decision, this stay will continue until the question has been finally decided and the parties will have the responsibility to inform this Court of the decision of the Supreme Court within five days of rendition of its opinion. If the Supreme Court does not decide the state location question, this Court will lift its stay and proceed in this case.

SO ORDERED this the 11th day of June, 1993.

/s/ William H. Barbour, Jr
CHIEF JUDGE

Supreme Court, U.S.
FILED
DEC 1 1993
OFFICE OF THE CLERK

No. 121, Original

In The

Supreme Court of the United States

October Term, 1993

STATE OF LOUISIANA,

Plaintiff,

v.

STATE OF MISSISSIPPI, et al.,

Defendants.

ANSWER OF DEFENDANTS JULIA DONELSON EHRHARDT, FORMERLY JULIA DONELSON HOUSTON, RUTH HOUSTON BAKER AND HINES H. BAKER, CO-EXECUTORS AND CO-TRUSTEES OF THE ESTATE OF GEORGE T. HOUSTON, A/K/A GEORGE T. HOUSTON, III, DECEASED, AND RUTH HOUSTON BAKER, INDIVIDUALLY

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No. 121, Original

In The

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STATE OF LOUISIANA,

Plaintiff,

v.

STATE OF MISSISSIPPI, et al.,

Defendants.

ANSWER OF DEFENDANTS JULIA DONELSON EHRHARDT, FORMERLY JULIA DONELSON HOUSTON, RUTH HOUSTON BAKER AND HINES H. BAKER, CO-EXECUTORS AND CO-TRUSTEES OF THE ESTATE OF GEORGE T. HOUSTON, A/K/A GEORGE T. HOUSTON, III, DECEASED, AND RUTH HOUSTON BAKER, INDIVIDUALLY

Julia Donelson Ehrhardt, formerly Julia Donelson Houston, Ruth Houston Baker and Hines H. Baker, Co-Executors and Co-Trustees of the Estate of George T. Houston, a/k/a George T. Houston, III, deceased, and Ruth Houston Baker, individually (collectively "Houston Defendants") respectfully file this Answer to the Complaint filed by the State of Louisiana ("Louisiana"):

JURISDICTION

COMPLAINT ¶ I: The original jurisdiction of this Court is invoked under Article III, Section 2, Clause 2 of the Constitution of the United States and Par. (a) Section 1251, Title 28, United States Code Annotated.

ANSWER: ADMITTED that this Court has jurisdiction.

COMPLAINT ¶ II: The State of Louisiana was admitted into the Union of the United States of America by the Act of Congress found in chapter 50 of the United States Statutes at Large, vol. 2, page 701, approved April 8, 1812, and therein the boundaries of the said State of Louisiana, in the preamble of said Act, were described as follows:

> "Whereas, the representatives of the people of all that part of the territory or country ceded, under the name of 'Louisiana' by the treaty made at Paris, on the thirtieth day of April, one thousand eight hundred and three (8 Stat. at L. 200), between the United States and France, contained within the following limits, that is to say: 'Beginning at the mouth of the river Sabine; thence, by a line drawn along the middle of said river, including all islands, to the thirty-second degree of latitude; thence due north to the northernmost part of the thirty-third degree of north latitude; thence along the said parallel of latitude to the river Mississippi; thence down the said river to the river Iberville; and from thence along the middle of the said river and lakes Maurepas and Pontchartrain, to the gulf of Mexico; thence bounded by the said gulf to the place of beginning, including all islands within three leagues of the coast. . . . ' "

ANSWER: ADMITTED.

COMPLAINT ¶ III: By the Act of Congress found in the United States at Large, vol. 2, p. 708, chap. 57, approved April 14, 1812, additional territory was added to the then-existing State of Louisiana, which additional territory was described in the following language:

> "Beginning at the junction of the Iberville with the river Mississippi; thence, along the middle of the Iberville, the river Amite, and of the lakes Maurepas and Pontchartrain to the eastern mouth of the Pearl River; thence up the eastern branch of Pearl River to the thirty-first degree of north latitude; thence along the said degree of latitude to the river Mississippi; thence down the said river to the place of beginning, shall become and form a part of the said state of Louisiana. . . . "

ANSWER: ADMITTED.

COMPLAINT ¶ IV: The territory lying adjacent to, and to the eastward of Louisiana, is the State of Mississippi, which latter state was admitted into the Union of the United States of America by the Act of Congress, approved March 1, 1817, 3 Stat 348 (U.S. Statutes at Large, vol. 3, chap. 23, page 348), whereby the inhabitants of the western part of the then-Mississippi territory were authorized to form for themselves a state constitution and to be admitted into the Union, the boundaries of the then-to-be-created state being described as follows:

> "Beginning on the river Mississippi at the point where the southern boundary line of the State of Tennessee strikes the same; thence east along the said boundary line to the Tennessee River; thence up the same to the mouth of Bear Creek; thence by a direct line to the northwest

corner of the county of Washington 'Alabama'; thence due south to the gulf of Mexico; thence westwardly, including all the islands within six leagues of the shore to the most eastern junction of the Pearl River with Lake Borgne; thence up said river to the thirty-first degree of north latitude; thence west along the said degree of latitude to the Mississippi River; thence up the same to the beginning.

ANSWER: ADMITTED.

COMPLAINT ¶ V: The effect of this legislation, as to the eastern boundary of the State of Louisiana, was to retain the channel or thread, sometimes known as the thalweg, of the Mississippi River as the original eastern boundary, as far south as the 31st degree of north latitude. Such original eastern boundary from the northeast tip of the State of Louisiana to said 31st degree of north latitude is common with the State of Mississippi.

ANSWER: DENIED as alleged. Generally, the thalweg of the Mississippi River may be said to constitute the boundary between the States of Louisiana and Mississippi. However, that general rule may be inapplicable under specific factual circumstances.

COMPLAINT ¶ VI: Under the law of Louisiana, the State of Louisiana owns the bed of the Mississippi River to the boundary line of the States of Louisiana and Mississippi. Under the law of the State of Mississippi, the riparian owner owns to the boundary line between said states. This Supreme Court of the United States has original jurisdiction of suits to determine the boundaries between states, and of parties adversely asserting title to the property of a state.

ANSWER: First sentence ADMITTED as a general statement of Louisiana and Mississippi law. Second sentence ADMITTED.

COMPLAINT ¶ VII: Until recently the primary interest in the determination of the exact boundary line in the Mississippi River between the two states has been as to navigation and fishing rights, and to masses of land where an avulsion has taken place.

ANSWER: DENIED.

COMPLAINT ¶ VIII: On the 29th day of July, 1986, there was filed in the United States District Court, Western Division of the Southern District of Mississippi, a complaint entitled *Julia Donelson Houston, et al. vs. Ruth M. Thomas, et al.*, Civil Action No. W86-0080(B). This Complaint to Remove Cloud filed against Louisiana residents and attacking the ownership of property of the State of Louisiana, raises the issue in this case as to the true location of the boundary between the States of Louisiana and Mississippi common to the Parish of East Carroll, Louisiana, and the County of Issaquena, Mississippi.

ANSWER: ADMITTED as to first sentence. DENIED as to second sentence. The Complaint did not name Louisiana as a defendant. Louisiana intervened asserting title.

COMPLAINT ¶ IX: In the said action presently pending in the United States District Court as aforesaid, complainants claim ownership of a portion of lands involved in this boundary dispute contrary to the continued assertion of jurisdiction, dominion and control of said area by the State of Louisiana under its inherent sovereignty.

ANSWER: ADMITTED that the Houston Defendants claim ownership to lands involved in the litigation, Stack Island or Island No. 94 and all accretions thereto ("Stack Island"). DENIED that Louisiana has asserted continuing jurisdiction, dominion and control over said area under its inherent sovereignty or otherwise.

COMPLAINT ¶ X: The above referenced action filed herein is styled as a Complaint to Remove Cloud and identifies numerous plaintiffs as the owners in fee simple of a certain tract of land purportedly lying in Mississippi, as against numerous defendants as residents and domiciliaries of the State of Louisiana.

ANSWER: ADMITTED.

COMPLAINT ¶ XI: Complainants in the district court recite their title as having derived from patents of the United States of America and subsequently recorded in Mississippi.

ANSWER: ADMITTED in part. The Houston Defendants, complainants in the district court, also claim title by deed from the State of Mississippi and adverse possession.

COMPLAINT ¶ XII: Complainants allege that Stack Island was affected by the divided flows of the Mississippi River into the natural erosion and accretion processes of the river, gradually migrating southward and westward.

ANSWER: ADMITTED.

COMPLAINT ¶ XIII: The State of Louisiana and the Lake Providence Port Commission, a political subdivision of the state, intervened in the federal district court action

in June, 1987, asserting that their rights arise under the Constitution of the United States and an Act of Congress approved April 8, 1812, admitting the State of Louisiana into the Union of the United States of America, which act is found at 2 Stat 701 (U.S. Statutes at Large, Vol. 2, chap. 50, p. 701).

ANSWER: ADMITTED as alleged, but any implication that Louisiana has any right or title to the lands in question is DENIED.

COMPLAINT ¶ XIV: The original complainants responded to the intervention and thereafter the State of Louisiana and the Lake Providence Port Commission filed a Third-Party Complaint against the State of Mississippi. The State of Mississippi answered the Third-Party Complaint.

Thereafter, the case followed the course set forth in detail in paragraphs 8 through 12 of the attached motion for leave to file a bill of complaint, having been rejected by this Court twice on earlier motions for original jurisdiction, then tried, appealed and heard on certiorari. This action is now in nearly identically the same posture as when originally commenced by private plaintiffs suing other private defendants in the District Court for the Southern District of Mississippi. The State of Louisiana is still seeking to determine its true legal boundary with the State of Mississippi in the vicinity of the disputed lands, which it owns.

ANSWER: ADMITTED as to the first paragraph and that the Mississippi court case followed the chronology set out in paragraphs 8 through 12 of the Motion of

Louisiana for Leave to File Bill of Complaint. DENIED as to Louisiana's claim of ownership.

COMPLAINT ¶ XV: The real question in dispute between plaintiff and defendants is the true location of the boundary line between the State of Louisiana and the State of Mississippi, which is dependent upon a determination of the location of both a frozen thalweg and the live thalweg, which follows the course of the Mississippi River itself as its bed and channel move with the gradual processes of accretion and erosion.

ANSWER: ADMITTED that a question in dispute is the location of the boundary between Mississippi and Louisiana. Otherwise DENIED as alleged. Insofar as the Houston Defendants are concerned, the dispute relates to title to Stack Island, claimed by the Houston Defendants and their predecessors since at least 1881.

COMPLAINT ¶ XVI: However, the determination of this river boundary also involves an interpretation of the acts of Congress setting forth the boundaries and determination of the boundaries between said two states, as well as the equal footing doctrine applicable to the states of the United States.

ANSWER: DENIED. The Houston Defendants know of no disagreement between the parties with respect to the interpretation of any act of Congress or the equal footing doctrine.

COMPLAINT ¶ XVII: Further, the Treaty of Peace concluded between the United States and Great Britain, September 3, 1783, 8 Stat 80, is also involved in this controversy, including an interpretation thereof as it

affects or may affect such boundary between the State of Mississippi and the State of Louisiana, which can only be made pursuant to the Constitution of the United States and federal law.

ANSWER: ADMITTED that the determination of the boundary between Mississippi and Louisiana is a matter of federal law but otherwise DENIED, as the Houston Defendants know of no dispute regarding the interpretation of the referenced Peace Treaty.

COMPLAINT ¶ XVIII: Consequently, in the necessary and essential exercise of sovereign rights, the exact location of the boundary line between Mississippi and Louisiana in the area at controversy becomes of major and substantial significance to the respective states, in view of the great value of the lands and water bottoms for navigational, hunting, fishing, timber and recreational purposes, as well the potential for the production of oil, gas and other minerals. Heretofore, it has not been necessary to determine with preciseness the exact location of such boundary line. This controversy now makes such a determination essential to the two sovereign states, as well as to their citizens.

ANSWER: ADMITTED that the boundary line between Mississippi and Louisiana in the area in controversy is a matter of substantial significance to the respective states. DENIED that the boundary issue has not previously been a matter of significance with respect to such states. DENIED to the extent the implication exists that the ownership of the "area at controversy" is necessarily controlled by the determination of the boundary between

Louisiana and Mississippi or that there is any "great" value for oil, gas, or other minerals involved.

COMPLAINT ¶ XIX: The property rights, the sovereign rights and the sanctity of the boundary between the States of Louisiana and Mississippi are inextricably involved in the litigation which commenced this controversy, thus instituted and pending in the United States District Court for the Western Division of the Southern District of the State of Mississippi, and said Court is not the forum proper to such determinations. Nor is the State of Louisiana required to submit its title to said Court, nor should it be.

ANSWER: ADMITTED that this Court is a proper forum for determination of the issues in this litigation. DENIED that the Houston Defendants' title is dependent upon the location of the boundary between Mississippi and Louisiana. DENIED as to all other allegations.

COMPLAINT ¶ XX: The decision of the Supreme Court of the United States herein will be conclusively binding on all private parties and it alone has the power to fix and determine the boundary lines herein described. The suit of *Julia Donelson Houston, et al. vs. Ruth M. Thomas, et al.*, should be stayed by Order of this Court until a final judgment herein can be had, and application is hereby made by the State of Louisiana for an Order to be issued by this Court, directed to the United States District Court, Western Division of the Southern District of Mississippi, staying all proceedings in said suit.

ANSWER: ADMITTED that the decision of the Supreme Court will be conclusively binding on all private parties.

Otherwise DENIED. Further, this Court has denied Louisiana's requested stay.

COMPLAINT ¶ XXI: The jurisdiction of the Supreme Court of the United States in boundary disputes between States is exclusive and original and, accordingly, it is appropriate that the suit of *Julia Donelson Houston, et al. vs. Ruth M. Thomas, et al.*, be stayed and all parties thereto be served with a copy of the Stay Order herein applied for, and be given the opportunity to assert such interests as they may have in this action.

ANSWER: ADMITTED that this Court has determined that its jurisdiction in this boundary dispute between Mississippi and Louisiana is original and exclusive. The remainder of the paragraph is DENIED. This Court has denied Louisiana's requested stay.

FIRST AFFIRMATIVE DEFENSE

Whatever the location of the boundary between Mississippi and Louisiana in the area of Stack Island, the Houston Defendants have legal, record title to Stack Island pursuant to a patent issued by the United States in 1888, effective 1881.

SECOND AFFIRMATIVE DEFENSE

The Houston Defendants have legal, record title to Stack Island pursuant to conveyances from the State of Mississippi.

THIRD AFFIRMATIVE DEFENSE

The State of Mississippi, through long-continued acts of assertion of jurisdiction and the exercise of dominion and control over the landmass known as Stack Island, has acquired jurisdiction of Stack Island, and Stack Island lies within the territorial limits of the State of Mississippi without regard to the location of the navigational course of the river. Mississippi has continuously assessed and collected taxes on Stack Island for more than 100 years. Louisiana has never assessed or collected taxes on the island. Through its courts, Mississippi has exercised jurisdiction over controversies involving ownership of the island. Louisiana has not.

FOURTH AFFIRMATIVE DEFENSE

Under the decisions of this Court, an island once within the jurisdiction of a particular state remains within that state's jurisdiction, without regard to changes in the location of a navigational course of the river in which such island is situated.

FIFTH AFFIRMATIVE DEFENSE

Stack Island has been clearly identifiable and traceable from early maps of the Mississippi River and aerial photographs as a single identifiable landmass for a period of more than 150 years.

SIXTH AFFIRMATIVE DEFENSE

The Houston Defendants and their predecessors in title have occupied the lands known as Stack Island, have

exercised exclusive, uninterrupted, open, and adverse possession and control, and have paid taxes on such property to the State of Mississippi or its political subdivisions for more than 100 years.

WHEREFORE, the Houston Defendants pray:

1. That this Court appoint a Special Master in this original action;

2. that the boundary between the State of Louisiana and the State of Mississippi be fixed, recognized, and determined and that the landmass known as Stack Island be held to be within the territorial boundaries of the State of Mississippi;

3. that the prayer for relief contained in Louisiana's complaint be otherwise denied and that the claim of the Houston Defendants to Stack Island be quieted against the State of Louisiana;

4. that all costs incurred in this original action be assessed against the Plaintiff, State of Louisiana; and

5. that the Houston Defendants have and recover such other and further relief as they may be shown justly entitled to receive.

Respectfully submitted,

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December 1, 1993

Supreme Court, U.S.
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No. 121, Original

In The

Supreme Court of the United States

October Term, 1993

STATE OF LOUISIANA,

Plaintiff,

v.

STATE OF MISSISSIPPI, et al.,

Defendants.

ANSWER OF DEFENDANT STATE OF MISSISSIPPI

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December, 1993

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October Term, 1993

STATE OF LOUISIANA,

Plaintiff,

v.

STATE OF MISSISSIPPI, et al.,

Defendants.

ANSWER OF DEFENDANT STATE OF MISSISSIPPI

The State of Mississippi respectfully files this Answer to the Complaint filed by the State of Louisiana ("Louisiana"):

JURISDICTION

Complaint ¶I: The original jurisdiction of this Court is invoked under Article III, Section 2, Clause 2 of the Constitution of the United States and Par. (a) Section 1251, Title 28, United States Code Annotated.

ANSWER: ADMITTED.

Complaint ¶II: The State of Louisiana was admitted into the Union of the United States of

America by the Act of Congress found in Chapter 50 of the United States Statutes at Large, vol. 2, page 701, approved April 8, 1812, and therein the boundaries of the said State of Louisiana, in the preamble of said Act, were described as follows:

"Whereas, the representatives of the people of all that part of the territory or country ceded, under the name of 'Louisiana' by the treaty made at Paris, on the thirtieth day of April, one thousand eight hundred and three (8 Stat. at L. 200), between the United States and France, contained within the following limits, that is to say: 'Beginning at the mouth of the river Sabine; thence, by a line drawn along the middle of said river, including all islands, to the thirty-second degree of latitude; thence due north to the northernmost part of the thirty-third degree of north latitude; thence along the said parallel of latitude to the river Mississippi; thence down the said river to the river Iberville; and from thence along the middle of the said river and lakes Maurepas and Pontchartrain, to the gulf of Mexico; thence bounded by the said gulf to the place of beginning, including all islands within three leagues of the coast . . . ' "

ANSWER: ADMITTED.

Complaint ¶III: By the Act of Congress found in the United States at Large, vol. 2, p. 708, chap. 57, approved April 14, 1812, additional territory was added to the then-existing State of Louisiana, which additional territory was described in the following language:

"Beginning at the junction of the Iberville with the river Mississippi; thence, along the

middle of the Iberville, the river Amite, and of the lakes Maurepas and Pontchartrain to the eastern mouth of the Pearl River; thence up the eastern branch of Pearl River to the thirty-first degree of north latitude; thence along the said degree of latitude to the river Mississippi; thence down the said river to the pace [sic] of beginning, shall become and form a part of the said state of Louisiana . . . "

ANSWER: ADMITTED.

Complaint ¶IV: The territory lying adjacent to, and to the eastward of Louisiana, is the State of Mississippi, which latter state was admitted into the Union of the United States of America by the Act of Congress, approved March 1, 1817, 3 Stat. 348 (U.S. Statutes at Large, vol. 3, chap. 23, page 348), whereby the inhabitants of the western part of the then-Mississippi territory were authorized to form for themselves a state constitution and to be admitted into the Union, the boundaries of the then-to-be-created state being described as follows:

"Beginning on the river Mississippi at the point where the southern boundary line of the State of Tennessee strikes the same; thence east along the said boundary line to the Tennessee River; thence up the same to the mouth of Bear Creek; thence by a direct line to the northwest corner of the county of Washington (Alabama); thence due south to the gulf of Mexico; thence westwardly, including all the islands within six leagues of the shore to the most eastern junction of the Pearl River with Lake Borgne; thence up

said river to the thirty-first degree of north latitude; thence west along the said degree of latitude to the Mississippi River; thence up the same to the beginning."

ANSWER: ADMITTED.

Complaint ¶V: The effect of this legislation, as to the eastern boundary of the State of Louisiana, was to retain the channel or thread, sometimes known as the thalweg, of the Mississippi River as the original eastern boundary, as far south as the 31st degree of north latitude. Such original eastern boundary from the northeast tip of the State of Louisiana to said 31st degree of north latitude is common with the State of Mississippi.

ANSWER: Mississippi admits that the original eastern boundary of the State of Louisiana was as stated in Paragraph V of the Complaint. Mississippi denies the remaining allegations of Paragraph V.

Complaint ¶VI: Under the law of Louisiana, the State of Louisiana owns the bed of the Mississippi River to the boundary line of the States of Louisiana and Mississippi. Under the law of the State of Mississippi, the riparian owner owns to the boundary line between said states. This Supreme Court of the United States has original jurisdiction of suits to determine the boundaries between states, and of parties adversely asserting title to the property of a state.

ANSWER: Mississippi admits that Paragraph VI of the Complaint is a general statement of the law.

Complaint ¶VII: Until recently the primary interest in the determination of the exact boundary line in the Mississippi River between the

two states has been as to navigation and fishing rights, and to masses of land where an avulsion has taken place.

ANSWER: DENIED.

Complaint ¶VIII: On the 29th day of July, 1986, there was filed in the United States District Court of the Southern District of Mississippi, Western Division, a Complaint entitled *Julia Donelson Houston, et al, vs. Ruth M. Thomas, et al, Civil Action No. W86-0080(B).* This Complaint to Remove Cloud filed against Louisiana residents and attacking the ownership of property of the State of Louisiana, raises the issue in this case as to the true location of the boundary between the States of Louisiana and Mississippi common to the Parish of East Carroll, Louisiana, and the County of Issaquena, Mississippi.

ANSWER: Mississippi admits that on the 27th day of July, 1986, there was filed in the United States District Court of the Southern District of Mississippi, Western Division, a Complaint entitled "Julia Donelson Houston, et al, vs. Ruth M. Thomas, et al, Civil Action No. W86-0080(B)" and that said Complaint to Remove Cloud was filed against Louisiana residents and others. Mississippi denies the remaining allegations of Paragraph VIII. Pleading further, Mississippi would show that the Complaint did not name the State of Louisiana as a defendant and that Louisiana intervened asserting title.

Complaint ¶IX: In the said action presently pending in the United States District Court as aforesaid, complainants claim ownership of a portion of lands involved in this boundary dispute contrary to the continued assertion of jurisdiction, dominion and control of said area by

the State of Louisiana under its inherent sovereignty.

ANSWER: Mississippi admits that in the said action presently pending in the United States District Court as aforesaid, the Houston defendants claim ownership of all of the lands involved in this boundary dispute, Stack Island or Island No. 94 and all accretions thereto (hereinafter Stack Island). Mississippi denies the remaining allegations of Paragraph IX of the Complaint. Pleading further, Mississippi denies that Louisiana has asserted continuing jurisdiction, dominion and control over said area under its inherent sovereignty or otherwise, and pleading further, Mississippi would show that the entirety of the lands involved in this action are wholly located within the State of Mississippi.

Complaint ¶X: The above referenced action filed herein is styled as a Complaint to Remove Cloud and identifies numerous plaintiffs as the owners in fee simple of a certain tract of land purportedly lying in Mississippi, as against numerous defendants as residents and domiciliaries of the State of Louisiana.

ANSWER: ADMITTED.

Complaint ¶XI: Complainants in the district court recite their title as having derived from patents of the United States of America and subsequently recorded in Mississippi.

ANSWER: ADMITTED.

Complaint ¶XII: Complainants allege that Stack Island was affected by the divided flows of the Mississippi River into the natural erosion

and accretion processes of the river, gradually migrating southward and westward.

ANSWER: ADMITTED.

Complaint ¶XIII: The State of Louisiana and the Lake Providence Port Commission, a political subdivision of the state, intervened in the federal district court action in June, 1987, asserting that their rights arise under the Constitution of the United States and an Act of Congress approved April 8, 1812, admitting the State of Louisiana into the Union of the United States of America, which act is found at 2 Stat. 701 (U.S. Statutes at Large, vol. 2, chap. 50, p. 701).

ANSWER: Mississippi admits that the State of Louisiana and the Lake Providence Port Commission intervened in the federal district court action in June, 1987, asserting that their rights arise under the Constitution of the United States and an Act of Congress approved April 8, 1812, admitting the State of Louisiana into the United States of America, which act is found at 2 Stat. 701 (U.S. Statutes at Large, vol. 2, chap. 50, p. 701). Mississippi denies the remaining allegations of Paragraph XIII. Pleading further, Mississippi denies that Louisiana or Lake Providence Port Commission have any rights whatsoever in the subject property arising under the Constitution or any act of Congress or otherwise.

Complaint ¶XIV: The original complainants responded to the intervention and thereafter the State of Louisiana and the Lake Providence Port Commission filed a Third-Party Complaint against the State of Mississippi. The State of Mississippi answered the Third-party Complaint.

Thereafter, the case followed the course set forth in detail in paragraphs 8 through 12 of the attached motion for leave to file a bill of complaint, having been rejected by this Court twice on earlier motions for original jurisdiction, then tried, appealed and heard on certiorari. This action is now in nearly identically the same posture as when originally commenced by private plaintiffs suing other private defendants in the District Court for the Southern District of Mississippi. The State of Louisiana is still seeking to determine its true legal boundary with the State of Mississippi in the vicinity of the disputed lands, which it owns.

ANSWER: Mississippi admits the first paragraph of Paragraph XIV of the Complaint. Mississippi admits that the federal district court case followed the chronology set forth in Paragraphs 8 through 12 of the Motion of Louisiana for Leave to File Bill of Complaint. Mississippi denies the remaining allegations of Paragraph XIV.

Complaint ¶XV: The real question in dispute between plaintiff and defendants is the true location of the boundary line between the State of Louisiana and the State of Mississippi, which is dependent upon a determination of the location of both a frozen thalweg and the live thalweg, which follows the course of the Mississippi River itself as its bed and channel move with the gradual processes of accretion and erosion.

ANSWER: Mississippi admits that a dispute is the location of the boundary line between the State of Louisiana and the State of Mississippi. Mississippi denies the remaining allegations of Paragraph XV. Pleading further,

Mississippi would show that the Rule of the Thalweg may be superseded by the Doctrine of Acquiescence as a result of the acts of the State of Mississippi of dominion, control and sovereignty over the lands in dispute coupled with the failure of the State of Louisiana to assert claims of right or jurisdiction.

Complaint ¶XVI: However, the determination of this river boundary also involves an interpretation of the acts of Congress setting forth the boundaries and determination of the boundaries between said two states, as well as the equal footing doctrine applicable to the states of the United States.

ANSWER: Mississippi admits that the determination of the boundary between the states involves interpretations of the Acts of Congress and the Equal Footing Doctrine. Mississippi denies the remaining allegations of Paragraph XVI of the Complaint. Pleading further, Mississippi would show that the law regarding the interpretation of the Acts of Congress and the Equal Footing Doctrine concerning the determination of the boundary between the State of Louisiana and the State of Mississippi is well settled and that this Court should find that the entirety of the lands involved in this action are wholly located within the State of Mississippi.

Complaint ¶XVII: Further, the Treaty of Peace concluded between the United States and Great Britain, September 3, 1783, 8 Stat. 80, is also involved in this controversy, including an interpretation thereof as it affects or may affect such boundary between the State of Mississippi and the State of Louisiana, which can only be

made pursuant to the Constitution of the United States and federal law.

ANSWER: Mississippi admits that an interpretation of the said Treaty of Peace may affect the boundary between the states. Mississippi denies the remaining allegations of Paragraph XVII of the Complaint. Pleading further, Mississippi would show that the interpretation of the said Treaty of Peace regarding the boundary between the State of Mississippi and the State of Louisiana is well settled and that this Court should find that the entirety of the lands involved in this action are wholly located within the State of Mississippi.

Complaint ¶XVIII: Consequently, in the necessary and essential exercise of sovereign rights, the exact location of the boundary line between Mississippi and Louisiana in the area at controversy becomes of major and substantial significance to the respective states, in view of the great value of the lands and water bottoms for navigational, hunting, fishing, timber and recreational purposes, as well as the potential for the production of oil, gas and other minerals. Heretofore, it has not been necessary to determine with preciseness the exact location of such boundary line. This controversy now makes such a determination essential to the two sovereign states, as well as to their citizens.

ANSWER: Mississippi admits that the boundary line between the State of Mississippi and the State of Louisiana in the area in controversy is a matter of substantial significance and such a determination is essential to the two sovereign states. Mississippi denies the remaining allegations of Paragraph XVIII of the Complaint.

Complaint ¶XIX: The property rights, the sovereign rights and the sanctity of the boundary between the States of Louisiana and Mississippi are inextricably involved in the litigation which commenced this controversy, thus instituted and pending in the United States District Court for the Western Division of the Southern District of the State of Mississippi, and said Court is not the forum proper to such determinations. Nor is the State of Louisiana required to submit its title to said Court, nor should it be.

ANSWER: Mississippi admits that this Court is a proper forum for determination of the issues in this litigation. Mississippi denies the remaining allegations of Paragraph XIX of the Complaint.

Complaint ¶XX: The decision of the Supreme Court of the United States herein will be conclusively binding on all private parties and it alone has the power to fix and determine the boundary lines herein described. The suit of *Julia Donelson Houston, et al vs Ruth M. Thomas, et al,* should be stayed by Order of this Court until a final judgment herein can be had, and application is hereby made by the State of Louisiana for an order to be issued by this Court, directed to the United States District Court, Western Division of the Southern District of Mississippi, staying all proceedings in said suit.

ANSWER: Mississippi admits that the decision of this Court will be binding on Mississippi and that this Court alone has the power to fix and determine the state boundary line. Mississippi denies the remaining allegations of Paragraph XX of the Complaint.

Complaint ¶XXI: The jurisdiction of the Supreme Court of the United States in boundary disputes between States is exclusive and original and, accordingly, it is appropriate that the suit of *Julia Donelson Houston, et al vs. Ruth M. Thomas, et al*, be stayed and all parties thereto be served with a copy of the Stay Order herein applied for, and be given the opportunity to assert such interests as they may have in this action.

ANSWER: Mississippi admits that the jurisdiction of the Supreme Court of the United States in boundary disputes between states is exclusive and original. Mississippi denies the remaining allegations of Paragraph XXI of the Complaint. Pleading further, Mississippi would show that this Court has denied the Request for Stay submitted by the State of Louisiana.

FIRST AFFIRMATIVE DEFENSE

The State of Mississippi has, through long continued acts of assertion of sovereignty and jurisdiction and the exercise of dominion and control over the land commonly known as Stack Island and has acquired sovereignty over and jurisdiction of Stack Island and all lands that are the subject of this controversy, and said lands lie within the territorial limits of the State of Mississippi without regard to the location of the thalweg by virtue of the Doctrine of Acquiescence. Mississippi has continuously assessed and collected taxes on the subject property for more than 100 years. Louisiana has never assessed or collected taxes on Stack Island. Township surveys prepared by the United States General Land Office in 1826-27 have shown Stack

Island as lying within the State of Mississippi. The General Land Office of the United States has further recognized Stack Island as being located within the State of Mississippi by virtue of a survey made in 1881 pursuant to an Act of Congress dated April 24, 1820, entitled "An Act Making Further Provision for the Sale of the Public Lands" and the acts supplemental thereto and by United States patents issued to Stephen B. Blackwell of Issaquena County, Mississippi, describing the property as being located within the State of Mississippi. Through its courts and law enforcement agencies, Mississippi has exercised sovereignty and jurisdiction over controversies involving ownership of Stack Island and criminal activities on the island. Additionally, the general reputation in the community is that Stack Island is located in the State of Mississippi.

SECOND AFFIRMATIVE DEFENSE

At the respective times that Louisiana and Mississippi were admitted as states to the United States, Stack Island lay on the east or Mississippi side of the boundary thalweg of the Mississippi River. Alternatively, if Stack Island was not in existence at the time of the admission of either or both of the states, Stack Island, when formed, was formed on the east or Mississippi side of the boundary thalweg of the Mississippi River.

THIRD AFFIRMATIVE DEFENSE

Under the law as established by this Court, an island once within the jurisdiction of a particular state remains within the jurisdiction of that state without regard to

changes in the location of the navigation course of the river in which such island is situated.

FOURTH AFFIRMATIVE DEFENSE

Stack Island, Mississippi, has been clearly identifiable and traceable from early maps of the Mississippi River and subsequent aerial photographs as a single identifiable land mass for a period of more than 150 years.

WHEREFORE, PREMISES CONSIDERED, the State of Mississippi respectfully prays:

1. That the Court appoint a Special Master in this original action;

2. That the Court grant the defendant, State of Mississippi, leave to file a counterclaim, as hereinafter set forth, against the State of Louisiana regarding the subject matter of this litigation;

3. That the prayer for relief contained in the Complaint be denied in its entirety;

4. That the Court, pursuant to this prayer and the prayer of the counterclaim for which leave to file is sought hereinafter, adjudicate that the subject lands are located wholly within the territorial boundaries of the State of Mississippi;

5. That all costs incurred in this original action be assessed against the plaintiff, State of Louisiana; and

6. That the Court grant such other and further relief as may be proper, equitable and just.

Respectfully submitted,

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December, 1993

No. 121, Original

In The

Supreme Court of the United States

October Term, 1993

STATE OF LOUISIANA,

Plaintiff,

v.

STATE OF MISSISSIPPI, et al.,

Defendants.

MOTION FOR LEAVE TO FILE COUNTERCLAIM

COMES NOW the State of Mississippi, defendant in the above styled and numbered cause, by and through Mike Moore, the Attorney General of the State of Mississippi, and files this its Motion for Leave to File Counterclaim against the plaintiff, State of Louisiana, and in support hereof respectfully states as follows:

1. A portion of the boundary between the State of Louisiana and the State of Mississippi, common to East Carroll Parish, Louisiana, and Issaquena County, Mississippi, is in dispute in the above styled and numbered cause.

2. This Court has now taken jurisdiction of the boundary dispute between the State of Louisiana and the State of Mississippi upon the allegations of the Complaint filed herein by the plaintiff, the State of Louisiana.

3. In order for this Court to render a final adjudication in this litigation predicated upon not only the factual allegations of the plaintiff, the State of Louisiana, but also upon the factual contentions of the defendant, the State of Mississippi, it is necessary for the State of Mississippi to be allowed to set forth its position not only regarding the allegations of the plaintiff, but also the allegations in support of defendant's claim that the boundary between the State of Mississippi and the State of Louisiana along the reach of the Mississippi River in question is not located as charged by the State of Louisiana.

WHEREFORE, PREMISES CONSIDERED, the State of Mississippi respectfully prays that this Honorable Court grant leave for defendant, the State of Mississippi, to file its Counterclaim against the plaintiff, the State of Louisiana, as hereinafter set forth, and if mistaken in the relief for which prayed in this Motion, the State of Mississippi

prays for such other, further, or more general relief as the Court may deem just and proper.

Respectfully submitted,

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State of Mississippi

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STATE OF MISSISSIPPI, et al.,

Defendants.

COUNTERCLAIM

COMES NOW the State of Mississippi, defendant-counterclaimant in the above styled and numbered cause, by and through Mike Moore, the Attorney General of the State of Mississippi, having fully answered the Complaint filed herein by the State of Louisiana, and files its Counterclaim against the plaintiff-counterdefendant, the State of Louisiana, and in support hereof would show unto the Court the following:

1. The State of Mississippi makes parties hereto the State of Louisiana and the following citizens of the State of Louisiana:

The Honorable Edwin Edwards
Governor of the State of Louisiana
State Capitol
Baton Rouge, Louisiana

The Honorable Richard P. Ieyoub
Attorney General
State of Louisiana
Baton Rouge, Louisiana

2. The original jurisdiction of this Court is invoked in this Counterclaim under the Constitution of the United States, Article III, Section 2, and 28 United States Code, Section 1251, Par. (a).

3. The State of Mississippi was admitted into the Union of the United States of America by Act of Congress found in 3 Statutes at Large 348, Ch. 23 (March 1, 1817), the boundaries of the state being described as follows:

> "Beginning on the river Mississippi at the point where the southern boundary line of the State of Tennessee strikes the same; thence east along the said boundary line to the Tennessee River; thence up the same to the mouth of Bear Creek; thence by a direct line to the northwest corner of the county of Washington (Alabama); thence due south to the gulf of Mexico; thence westwardly, including all the islands within six leagues of the shore to the most eastern junction of the Pearl River with Lake Borgne; thence up said river to the thirty-first degree of north latitude; thence west along the said degree of latitude to the Mississippi River; thence up the same to the beginning."

4. The State of Louisiana was admitted into the Union of the United States of America by the Act of Congress found in Chapter 50 of the United States Statutes at Large, vol. 2, page 701, approved April 8, 1812, and therein the boundaries of the said State of Louisiana, in the preamble of said Act, were described as follows:

> "Whereas, the representatives of the people of all that part of the territory or country ceded, under the name of 'Louisiana' by the treaty made at Paris, on the thirtieth day of April, one thousand eight hundred and three (8 Stat. at L. 200), between the United States and France, contained within the following limits, that is to say: 'Beginning at the mouth of the river Sabine; thence, by a line drawn along the middle of said river, including all islands, to the thirty-second degree of latitude; thence due north to the northernmost part of the thirty-third degree of north latitude; thence along the said parallel of latitude to the river Mississippi; thence down the said river to the river Iberville; and from thence along the middle of the said river and lakes Maurepas and Pontchartrain, to the gulf of Mexico; thence bounded by the said gulf to the place of beginning, including all islands within three leagues of the coast . . . ' "

By the Act of Congress found in the United States at Large, vol. 2, p. 708, chap. 57, approved April 14, 1812, additional territory was added to the then-existing State of Louisiana, which additional territory was described in the following language:

> "Beginning at the junction of the Iberville with the river Mississippi; thence, along the middle of the Iberville, the river Amite, and of the lakes Maurepas and Pontchartrain to the eastern mouth of the Pearl River; thence up the eastern branch of Pearl River to the thirty-first degree of north latitude; thence along the said degree of latitude to the river Mississippi; thence down the said river to the place of beginning, shall become and form a part of the said state of Louisiana . . . "

5. The westerly boundary of the State of Mississippi and the easterly boundary of the State of Louisiana in the reach of the Mississippi River adjacent to Stack Island or Island No. 94 and all accretions thereto (hereinafter Stack Island), more particularly described as follows, to-wit:

The west bounds of Stack Island, Mississippi, or Island No. 94, by geodetic positions of the vertexes, numbered Point 1 through Point 21, is described as follows:

Beginning at Pt. 1 at North Latitude 32° 49' 25" and West Longitude 91° 09' 27", said Pt. 1 being at the foot of the West bounds of Baleshed Towhead, Mississippi and the head of the West bounds of Stack Island, Mississippi, which was fixed along the thalweg of the abandoned Mississippi River Channel in about 1954, thence Southward with the fixed thalweg (marking the Mississippi-Louisiana boundary) in the abandoned sector of Lake Providence Bend channel at Pt. 2, Latitude 32° 49' and Longitude 91° 09' 34"; thence to Pt. 3, Latitude 32° 48' 47"and Longitude 91° 09' 37"; thence to Pt. 4, Latitude 32° 48' 30" and Longitude 91° 09' 39"; thence to Pt. 5, Latitude 32° 48' and Longitude 91° 09' 47"; thence to Pt. 6, Latitude 32° 47' 18" and Longitude 91° 09' 51"; thence to Pt. 7, Latitude 32° 47' 6" and Longitude 91° 09' 54"; thence to Pt. 8, Latitude 32° 47' and Longitude 91° 09' 59"; thence to Pt. 9, Latitude 32° 46' 50" and Longitude 91° 10' 7"; thence to Pt. 10, Latitude 32° 46' 35" and Longitude 91° 10' 14"; thence to Pt. 11, Latitude 32° 46' 20" and Longitude 91° 10' 16"; thence to Pt. 12, Latitude 32° 46' and Longitude 91° 10' 18"; thence to Pt. 13, Latitude 32° 45' 45" and Longitude 91° 10' 20"; thence to Pt. 14, Latitude 32° 45' 30" and Longitude 91° 10' 18"; thence to Pt. 15, Latitude 32° 45' 15"

and Longitude 91° 10' 12"; thence to Pt. 16, Latitude 32° 45' and Longitude 91° 10' 01"; thence to Pt. 17, Latitude 32° 44' 45" and Longitude 91° 09' 49"; thence to Pt. 18, Latitude 32° 44' 30" and Longitude 91° 09' 38"; thence to Pt. 19, Latitude 32° 44' 23" and Longitude 91° 09' 30"; thence to Pt. 20, Latitude 32° 44' 15" and Longitude 91° 09' 18"; thence to Pt. 21, Latitude 32° 44' 07" and Longitude 91° 09'; thence to Pt. 22, Latitude 32° 44' and Longitude 91° 08' 44"; said Pt. 21 marks 1975 downstream bounds of Stack Island fixed thalweg (Fixed Interstate Mississippi-Louisiana boundary) and the beginning of the 1975 live thalweg (Live Interstate, Mississippi-Louisiana boundary).

6. From the time of its formation, Stack Island and its accretions have been bounded on the west by the Mississippi River channel thalweg, the interstate boundary between Mississippi and Louisiana, and bounded on the east by the chute channel, which has a bed that lies entirely within the State of Mississippi.

7. Stack Island, Mississippi, was subject to the divided flows of the Mississippi River and to the natural erosions and accretions processes of this dynamic alluvial river, and was gradually, progressively and imperceptibly enlarged southward and westward until it reached its present location.

8. After about the year 1908, the river gradually enlarged the bounding chute channel on the east. Further, in about the year 1913, the enlarging Mississippi chute channel was adopted for navigation.

9. After about the year 1925, the bounding Mississippi chute channel continued to enlarge and flows

increased therein with corresponding lessening of flows in the Mississippi-Louisiana bounding channel on the west. Further, by about 1934, divided flow conditions were favorable for the formation of accretions to the foot of Stack Island and for the river to gradually and finally abandon the old Mississippi-Louisiana boundary channel west of Stack Island. By about the year 1954, this old abandoned channel had become attenuated and filled by alluvium (silt and sand), and the water ceased to flow therein and the Mississippi-Louisiana boundary thalweg channel became fixed as it existed at the time said water ceased to flow.

10. The enlargement of the former east chute channel of the Mississippi River and the corresponding abandonment of the west boundary channel was avulsive in nature and did not operate to change the state boundary at Stack Island. By reason of said avulsive action, the Mississippi-Louisiana state boundary became firmly and finally fixed along the locus of the middle of the former main navigation channel, sometimes called the thalweg, which former channel is identical with the west boundary of the lands described and known as Stack Island as described in Paragraph 5 above.

11. The State of Mississippi has, through long continued acts of assertion of sovereignty and jurisdiction and the exercise of dominion and control over the land commonly known as Stack Island, acquired sovereignty over and jurisdiction of Stack Island and all lands that are the subject of this controversy, and said lands lie within the territorial limits of the State of Mississippi without regard to the location of the thalweg by virtue of the Doctrine of Acquiescence. Mississippi has continuously

assessed and collected taxes on the subject property for more than 100 years. Louisiana has never assessed or collected taxes on Stack Island. Township surveys prepared by the United States General Land Office in 1826-27 have shown Stack Island as lying within the State of Mississippi. The General Land Office of the United States has further recognized Stack Island as being located within the State of Mississippi by virtue of a survey made in 1881 pursuant to an Act of Congress dated April 24, 1820, entitled "An Act Making Further Provision for the Sale of the Public Lands" and the acts supplemental thereto and by United States patents issued to Stephen B. Blackwell of Issaquena County, Mississippi, describing the property as being located within the State of Mississippi. Through its courts and law enforcement agencies, Mississippi has exercised sovereignty and jurisdiction over controversies involving ownership of the island and criminal activities on the island. Additionally, the general reputation in the community is that Stack Island is located in the State of Mississippi.

12. In the necessary and essential exercise of sovereign rights, the exact location of the boundary line between Mississippi and Louisiana in the area involved becomes of major and substantial significance to the respective states, in view of the great value of the lands involved, the necessity of determining the limits of each state's respective criminal jurisdiction, the fixing of the state boundary line for purposes of taxation, and for all other purposes incident thereto. Heretofore, it has not been necessary to determine with preciseness the exact location of such boundary line.

WHEREFORE, PREMISES CONSIDERED, defendant-counterclaimant respectfully prays:

1 That on a final hearing hereof, the complaint filed herein by the State of Louisiana be dismissed and that the plaintiff-counterdefendant, the State of Louisiana, be denied the relief sought therein.

2. That on a final hearing hereof, the boundary line of the State of Mississippi and the State of Louisiana be fixed in the abandoned bed of the Mississippi River along the line as set forth in Paragraph 5 above.

3. Defendant-counterclaimant also prays for such other and further relief, general or special, as the Court may deem meet and proper.

Respectfully submitted,

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December, 1993

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In The

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October Term, 1993

STATE OF LOUISIANA,

Plaintiff,

v.

STATE OF MISSISSIPPI, et al.,

Defendants.

ANSWER OF THE HOUSTON GROUP TO THE MOTION OF THE STATE OF LOUISIANA TO FILE COMPLAINT

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Defendants.

ANSWER OF THE HOUSTON GROUP TO THE MOTION OF THE STATE OF LOUISIANA TO FILE COMPLAINT

Julia Donelson Houston (now Ehrhardt), Ruth Houston Baker and Hines H. Baker, Jr., Co-Executors and Co-Trustees under the Estate of George T. Houston, a/k/a George T. Houston, III, Deceased, and Ruth Houston Baker, Individually (collectively "Houston Group"), respectfully submit this Answer to the Motion of the State of Louisiana to File Complaint.

The Houston Group does not object to this Court's exercise of original jurisdiction over the Complaint proposed to be filed by Louisiana. This Court has original jurisdiction over the entire case, including both boundary and title issues. 28 U.S.C. § 1251(a), (b)(3) (1988). While this Court has repeatedly said that its original jurisdiction

should be exercised "sparingly," *see Mississippi v. Louisiana*, 113 S. Ct. 549, 552 (1992), the Court is urged to accept jurisdiction with respect to the boundary and title questions and to resolve this controversy in one proceeding.

Respectfully submitted,

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October 4, 1993

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v.

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Defendants.

ANSWER OF PLAINTIFF STATE OF LOUISIANA TO COUNTERCLAIM OF THE STATE OF MISSISSIPPI

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Defendants.

ANSWER OF PLAINTIFF STATE OF LOUISIANA TO COUNTERCLAIM OF THE STATE OF MISSISSIPPI

The State of Louisiana and its Governor, the Honorable Edwin W. Edwards, and its Attorney General, the Honorable Richard P. Ieyoub, respectfully file this Answer to the Counterclaim filed by the State of Mississippi:

1.

The allegations of Paragraph one of the Counterclaim require no answer except to state that Honorable Edwin W. Edwards is the Governor of the State of Louisiana and Honorable Richard P. Ieyoub is the Attorney General of the State of Louisiana. The purpose of their joinder as

citizens is unknown and Louisiana moves their dismissal from this action as such.

2.

The allegations of Paragraph two are admitted, as plead in Paragraph I of Louisiana's complaint.

3.

The allegations of Paragraph three are generally admitted, the issue and real question in dispute between the parties being the true location of the boundary line between the states of Louisiana and Mississippi, which is dependent upon application of controlling principles of law for the determination of its location, all facts considered.

4.

The allegations of Paragraph four are generally admitted, these allegations being nothing more than a recitation of Paragraph II of Louisiana's original complaint.

5.

The allegations of Paragraph five are specifically and emphatically denied and it is shown that the description provided by Mississippi is incorrect and in conflict with applicable principles of law.

6.

The allegations of Paragraph six are specifically and emphatically denied.

7.

The allegations of Paragraph seven are denied as written.

8.

The allegations of Paragraph eight are denied as written, but it is generally admitted that the chute channel to the east of Stack Island did enlarge again during this period of time, and earlier. However, this singular event is not dispositive of the boundary issue.

9.

The allegations of Paragraph nine are denied.

10.

The allegations of Paragraph ten are denied.

11.

The allegations of Paragraph eleven are denied and it is shown that the State of Mississippi has never asserted acts of sovereignty, jurisdiction, dominion or control over either the accretion to the west bank of the Mississippi River or to the island in the center of the river now known as Stack Island or Rabbit Island nor of any other

lands which may be the subject of this controversy. It is further shown that Louisiana has never acquiesced in the exercise of sovereignty or jurisdiction by Mississippi. The remainder of the allegations are specifically and emphatically denied.

12.

The allegations of Paragraph twelve are generally admitted, these being a re-statement of Paragraphs XVIII and XIX of Louisiana's original complaint.

WHEREFORE, premises considered, plaintiff-counterdefendant(s), the State of Louisiana and its Governor and Attorney General respectfully pray:

1. That, on final hearing hereof, the relief prayed for in the complaint filed herein by the State of Louisiana be granted and the boundary line between the State of Louisiana and the State of Mississippi be fixed, recognized and determined according to law.

2. Plaintiff-counterdefendant(s) also pray for such other and further relief, general or special, as the Court may deem fit and proper.

Respectfully submitted:

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Attorney General
State of Louisiana

JACK E. YELVERTON
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KAY KIRKPATRICK
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February 7, 1994

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(6)

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STATE OF LOUISIANA,

Plaintiff,

vs.

STATE OF MISSISSIPPI, et al.,

Defendants.

Before The Honorable Vincent L. McKusick

MOTION OF THE HOUSTON DEFENDANTS FOR LEAVE TO FILE SUPPLEMENTAL ANSWER AND SUPPLEMENTAL ANSWER

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STATE OF LOUISIANA,

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vs.

STATE OF MISSISSIPPI, et al.,

Defendants.

Before The Honorable Vincent L. McKusick

MOTION OF THE HOUSTON DEFENDANTS FOR LEAVE TO FILE SUPPLEMENTAL ANSWER

Julia Donelson Ehrhardt, formerly Julia Donelson Houston, Ruth Houston Baker and Hines H. Baker, Co-Executors and Co-Trustees of the Estate of George T. Houston, a/k/a George T. Houston, III, deceased, and Ruth Houston Baker, individually, (collectively the "Houston Defendants") respectfully file this Motion for Leave to File Supplemental Answer to Louisiana's Complaint herein.

1. Pursuant to leave of this Court, Louisiana filed this original action on November 1, 1993. The Houston Defendants filed their Answer on December 1, 1993. Thereafter, this case was referred to the Honorable Vincent L. McKusick, Special Master.

2. This case involves, among other things, a dispute between Louisiana and the Houston Defendants regarding the Houston Defendants' title to real property, which title may be traced to a federal land patent effective 1881 issued to the Houston Defendants' predecessor in title.

3. Louisiana first challenged the validity of that federal land patent in its July 26, 1994 trial brief filed with the Special Master. Prior to that time, the patent had not been challenged and the Houston Defendants were unaware that Louisiana intended to do so.

4. On August 8, 1994, the Houston Defendants forwarded their Supplemental Answer to the Special Master. The Supplemental Answer asserts, as an affirmative defense, that Louisiana's challenge to the land patent is time-barred due to the passage of more than 100 years since the issuance of the patent.

5. On August 10, 1994, the Special Master instructed the Houston Defendants to apply to the Supreme Court for leave to file the Supplemental Answer.

6. Neither Mississippi nor Louisiana has any objection to the filing of the Supplemental Answer. The Houston Defendants could not assert the affirmative defense earlier because they did not know that Louisiana intended to challenge the validity of the federal land patent.

WHEREFORE, The Houston Defendants respectfully seek leave to file their Supplemental Answer to

Louisiana's Complaint, said Supplemental Answer to be in the form attached.

Respectfully submitted,

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No. 121, Original

In The

Supreme Court of the United States

October Term, 1994

STATE OF LOUISIANA,

Plaintiff,

vs.

STATE OF MISSISSIPPI, et al.,

Defendants.

Before The Honorable Vincent L. McKusick

SUPPLEMENTAL ANSWER OF THE HOUSTON DEFENDANTS

COME NOW Julia Donelson Ehrhardt, formerly Julia Donelson Houston, Ruth Houston Baker and Hines H. Baker, Co-Executors and Co-Trustees of the Estate of George T. Houston, a/k/a George T. Houston, III, deceased, and Ruth Houston Baker, individually, (collectively the "Houston Defendants") and file this Supplemental Answer to the Complaint filed by the State of Louisiana ("Louisiana"). This Supplemental Answer is filed in addition to, and not in lieu of, the Answer previously filed by the Houston Defendants. This Supplemental Answer does not supersede the Houston Defendants' prior pleadings herein.

By way of Supplemental Answer, the Houston Defendants plead the following affirmative defense in addition to their answer and defenses pleaded previously:

SEVENTH AFFIRMATIVE DEFENSE

Louisiana's challenge to the validity of the federal land patent issued to Stephen B. Blackwell, coming more than 100 years after the issuance of the patent, is stale and time-barred.

WHEREFORE, the Houston Defendants pray:

1. That the boundary between the State of Louisiana and the State of Mississippi be fixed, recognized, and determined and that the landmass known as Stack Island (also referred to in these proceedings as the "Disputed Area") be held to be within the territorial boundaries of the State of Mississippi;

2. that the prayer for relief contained in Louisiana's complaint be otherwise denied and that the claim of the Houston Defendants to Stack Island/Disputed Area be quieted against the State of Louisiana;

3. that all costs incurred in this original action be assessed against the State of Louisiana; and

4. that the Houston Defendants have and recover such other and further relief as they may be shown justly entitled to receive.

Respectfully submitted,

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STATE OF LOUISIANA,

Plaintiff,

v.

STATE OF MISSISSIPPI, et al.,

Defendants.

FINAL REPORT OF THE SPECIAL MASTER

VINCENT L. MCKUSICK
Special Master
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October 24, 1994

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No. 121, Original

In The

Supreme Court of the United States

October Term, 1994

STATE OF LOUISIANA,

Plaintiff,

v.

STATE OF MISSISSIPPI, et al.,

Defendants.

FINAL REPORT OF THE SPECIAL MASTER

The State of Louisiana commenced this original jurisdiction action on August 6, 1993, by filing its motion for leave to file a complaint against the State of Mississippi and a family group of property owners who are here called the "Houston Group."[1] By the complaint and other pleadings, the parties ask the Court to define the State boundary between Louisiana and Mississippi for a length of about seven miles along the Lake Providence Reach of

[1] Louisiana's Complaint identifies the non-State Defendants, the Houston Group, as follows: Julia Donelson Houston, Ruth Houston Baker and Hines H. Baker, Jr., Co-Executors and Co-Trustees of the Estate of George T. Houston, a/k/a George T. Houston, III, deceased, adult residents and citizens of Mississippi, and Ruth Houston Baker, individually, an adult domiciled in Harris County, Texas. The non-State Defendants pronounce their family name "Hów-stun."

the Mississippi River in the vicinity of Lake Providence, Louisiana. They also, as a related matter, ask the Court to settle, solely as between the State of Louisiana and the Houston Group, a controversy over title to an elongated piece of land (here called the "Disputed Area"), now about 2,000 acres in area and nearly seven miles in length, that lies along the Louisiana bank of the river.

The Disputed Area is bounded on the west by what the State of Mississippi and the Houston Group (the "Mississippi Parties") claim as the State boundary,[2] and on the east by the main downstream navigation channel, or live thalweg, of the Mississippi River, which the State of Louisiana now claims to be the State boundary.

After thoroughly reviewing the very extensive record of testimony and exhibits and carefully considering the trial briefs, post-trial memoranda and closing arguments of counsel, I recommend that the Court hold that the Louisiana-Mississippi boundary is located on the line proposed by the Mississippi Parties, and that the Court deny the State of Louisiana's prayer for cancellation of the Houston Group's claim of title to the Disputed Area.

---

[2] The State boundary line contended for by the Mississippi Parties is defined in the testimony of their expert witness, Austin B. Smith. This Report will accordingly refer to that proposed boundary as the "Austin Smith Line." That line is identified by 22 points shown on Exhibits P-32D and LA-1A, a full description of the line by latitude-longitude calls being set forth in Appendix A to this Report.

I. BACKGROUND

A. History of the Related Litigation Brought in the United States District Court, Southern District of Mississippi.

The State boundary issue raised in this case, as well as the title issue between the State of Louisiana and the Houston Group, have previously been tried to judgment in the United States District Court for the Southern District of Mississippi and have been carried on appeal to judgment in the Court of Appeals for the Fifth Circuit.[3] *See Houston v. Thomas*, 937 F.2d 247 (5th Cir. 1991), *reh'g denied*, 947 F.2d 1489 (5th Cir.), *cert. granted in part sub nom. Mississippi v. Louisiana*, 112 S. Ct. 1472, 117 L.Ed.2d 616 (1992), *rev'd in part and remanded in part*, 113 S. Ct 549, 121 L.Ed.2d 466, *on remand*, 984 F.2d 642 (5th Cir. 1993).

---

[3] Title to the southern end of Stack Island (by then affixed to the Louisiana bank) was the subject of litigation between the Houstons and U.S. Gypsum Co. that resulted in three reported opinions of the Fifth Circuit. *See Houston v. United States Gypsum Co.*, 569 F.2d 880 (5th Cir. 1978), *on reh'g*, 580 F.2d 815 (5th Cir.), *on appeal after remand*, 652 F.2d 467 (5th Cir. 1981). In that diversity action, commenced in the Southern District of Mississippi in 1973, the Houstons claimed record title to the whole "migrated" Stack Island, while U.S. Gypsum, the owner of the Shipland Plantation along the Mississippi bank opposite Lake Providence, Louisiana, claimed the accretions that formed the southern part of Stack Island. *See id.* The court, which presumed that Stack Island (in this report called the Disputed Area) lay within the State of Mississippi (569 F.2d at 881-82), held that U.S. Gypsum had record title to the Stack Island accretions within Gypsum's north and south boundary lines extended westward to the State boundary (580 F.2d at 817-18), but that the Houstons had acquired title to those southern accretions by adverse possession (652 F.2d at 472-75).

The District Court found in favor of Mississippi on the boundary issue, whereas the Court of Appeals reversed and ordered judgment in favor of Louisiana. On certiorari, however, this Court held that the lower federal courts were without jurisdiction to decide the State boundary question. *See Mississippi v. Louisiana*, 113 S. Ct. 549, 121 L.Ed.2d 466. A review of the history of that related litigation, the outcome of which inspired this original jurisdiction action, is helpful to an understanding of the context of this present action and of the record presented by the parties to the Special Master.

The related litigation, known as *Houston v. Thomas* in the lower courts, was commenced in the federal court in the Southern District of Mississippi on July 29, 1986. The Houston Group, as plaintiffs in that diversity suit to quiet title, claimed ownership of what we now call the Disputed Area and named as defendants one Thomas and certain other Louisiana riparians. The Houston Group claimed that the Disputed Area, although no longer insular in form, was a part of the State of Mississippi because it derived from an island (known as Stack Island or Island No. 94) that was originally located within the bounds of Mississippi, before the river's main navigation channel shifted to the east side of the island. The Houston Group traced record title to "Stack Island" back to an 1888[4] homestead patent from the United States as well as to a 1934 tax foreclosure deed from the State of Mississippi. In

[4] The United States issued its patent for Stack Island to Stephen B. Blackwell in 1888 on the basis of a survey of the island made for the U.S. General Land Office in August 1881. The patent was effective as of 1881.

November 1987 the State of Louisiana,[5] having intervened in the Mississippi federal court action, filed a third-party complaint against the State of Mississippi, asserting that the Disputed Area lay within its State boundaries.

Thereafter, the State of Louisiana unsuccessfully sought a decision by this Court on the Louisiana-Mississippi boundary question. On September 15, 1988, it filed its motion in No. 114 Original for leave to file a complaint against the Mississippi Parties. On December 12, 1988, the Court without opinion denied Louisiana's motion, with Justice White, joined by Justices Stevens and Scalia, dissenting in an opinion. *Louisiana v. Mississippi*, 488 U.S. 990 (1988). On February 27, 1989, the Court denied without opinion Louisiana's motion for rehearing, as well as its alternative motion to file a complaint against the State of Mississippi alone. *Id.*, 489 U.S. 1050 (1989).

In the summer and early fall of 1989, *Houston v. Thomas* went to trial before the Honorable William H. Barbour, Jr., United States District Judge, on a bifurcated basis, first on the boundary issue and then on the title issue. The trial generated a record of 961 pages of testimony by 24 expert and lay witnesses and 209 exhibits, many consisting of historical maps, surveys and charts. In an extensive unreported bench opinion, the District Court

[5] The Lake Providence Port Commission, an entity of the State of Louisiana, joined the State of Louisiana in intervening in *Houston v. Thomas*, but is not a party in this original jurisdiction action.

held in favor of the Mississippi Parties.[6] On the boundary issue, it held that the Disputed Area lay in Mississippi. It found that the boundary thalweg lay west of Stack Island in 1881 when the island was surveyed for patenting purposes; that in the period of 1911 to 1913 the main navigation channel shifted to the east side of Stack Island but that the boundary thalweg remained on the west side; and that in subsequent years Stack Island by progressive accretion and erosion grew and moved to the southwest against the Louisiana bank of the river. The court accepted the opinion of Mississippi's expert witness, Austin B. Smith, that the boundary line should be drawn along the location of the channel between the migrated Stack Island and the Louisiana shore just before the time that water ceased to run through that channel in about 1954. Alternatively on the boundary issue, the District Court held that, under the Doctrine of Acquiescence, the Disputed Area had in any event become part of Mississippi because the State of Louisiana had acquiesced in the exercise by the State of Mississippi of exclusive jurisdiction over the Disputed Area from 1881 to the present. On the title issue, the District Court found the Houston Group to have record title to the Disputed Area, rejecting any claims of the State of Louisiana and of Louisiana riparian owners to title by adverse possession under Mississippi law.

---

[6] *See* Judge Barbour's June 23, 1989, bench opinion on the boundary issue in *Houston v. Thomas, reprinted in* Appendix to Pet. for Cert., *Mississippi v. Louisiana* (No. 91-1158) at 19a-43a (hereafter "Barbour Bench Opn."). Judge Barbour's October 2, 1989, bench opinion on the title issue is reprinted in *id.* at 50a-69a.

The State of Louisiana appealed the District Court judgment to the Court of Appeals for the Fifth Circuit. That court on August 5, 1991, reversed the District Court on the boundary issue and entered judgment instead in favor of the State of Louisiana, adjudging the Disputed Area to be within Louisiana. *See Houston v. Thomas*, 937 F.2d at 254. In arriving at that conclusion, the Court of Appeals held that the District Court had committed clear error in its finding of fact that in 1881 the main navigation channel lay west of Stack Island. To the contrary, the Court declared, the evidence established that the main navigation channel lay east of the island at that time, so that by application of the Island Exception the boundary remained frozen on the east side of the island when dike construction by the Mississippi River Commission in 1882-83 shifted the main navigation channel onto the other side.[7] In regard to the District Court's alternative

---

[7] In his testimony in *Houston v. Thomas* the State of Louisiana's expert in civil engineeering, potamology and boundary surveys, Hatley N. Harrison, Jr., placed the Louisiana-Mississippi State boundary along a frozen thalweg to the east of the 1881 Stack Island. That proposed boundary (the "Hatley Harrison Line") was identified by Points A through H displayed on Exhibit LA-1A and defined by latitude-longitude calls in Exhibit LA-32F-1. *See* Appendix B for a full description of the Hatley Harrison Line. It lies still farther east from the Disputed Area than the present main navigation channel or live thalweg of the river.

At the conclusion of the supplemental hearings before the Special Master, the State of Louisiana withdrew its support for the Hatley Harrison Line, instead claiming that the State boundary in the vicinity of the Disputed Area lies along the live thalweg of the Mississippi River. *See* volume 5, page 207 of the transcript of the supplemental hearings (hereafter "Sup. Tr.").

ground for holding in favor of Mississippi, the Court of Appeals held that the evidence before the District Court did not establish acts of sufficient duration and magnitude to justify application of the Doctrine of Acquiescence.

This Court granted certiorari on the alternative thalweg and acquiescence questions involved in the boundary issue and formulated a third question: "Did the district court properly assert jurisdiction over respondent's third-party complaint against petitioner State of Mississippi?" *Mississippi v. Louisiana*, 112 S. Ct. 1472, 117 L.Ed.2d 616. The boundary issue was fully briefed and argued orally, along with the jurisdiction question. On December 14, 1992, this Court held unanimously that the District Court lacked jurisdiction over Louisiana's third-party complaint against Mississippi and accordingly vacated the judgment entered by the Fifth Circuit in favor of Louisiana on the boundary issue. *See id.*, 113 S. Ct. 549, 121 L.Ed.2d 466. This Court remanded the balance of the case for inquiry whether further proceedings were required to adjudicate the title issue. *Id.*

In due course the Fifth Circuit remanded the case to the District Court, which on June 11, 1993, stayed further proceedings in *Houston v. Thomas*.

B. Procedural History of This Action.

On August 6, 1993, the State of Louisiana filed its motion for leave to file a complaint against the State of Mississippi and the Houston Group. This Court granted Louisiana's motion on November 1, 1993. *See Louisiana v.*

Mississippi, 114 S. Ct. 377, 126 L.Ed.2d 327 (1993). Louisiana's complaint in this action asks that the Court fix the State boundary along the Mississippi River in the vicinity of Lake Providence, Louisiana, and that the Houston Group's claim of title to the Disputed Area be "cancelled and forever held for naught." On December 1, 1993, the Mississippi Parties[8] filed their answers, the State of Mississippi counterclaiming on the boundary issue. The State of Louisiana filed its answer to Mississippi's counterclaim on February 7, 1994. The Court appointed the undersigned as Special Master on March 7, 1994.

After taking the oath as Special Master, I held the First Meeting of Counsel by telephone conference on March 23, 1994. In a Second Meeting of Counsel held at the United States Courthouse in Vicksburg, Mississippi, on May 5, the parties agreed that they would submit this action to the Court on the record made before Judge Barbour in *Houston v. Thomas*, supplemented with such further testimony and exhibits as the parties might desire. Also on May 5, accompanied by all counsel, I took a view by boat of the Disputed Area, which was then largely flooded, the river standing at about 46 feet above ordinary low water on the Vicksburg gage.

Following the Second Meeting of Counsel, I laid out in a litigation management order (as later amended) a schedule for the conduct of further proceedings before me. On that schedule the parties filed trial briefs and met

[8] The State of Mississippi and the Houston Group have taken identical positions on all issues in this action.

for a Third Meeting of Counsel and final pretrial conference at the John Minor Wisdom U.S. Court of Appeals Building in New Orleans on August 10. There the parties marked the bulk of their supplemental exhibits and filed them with the Special Master. On August 31 they prefiled with the Special Master all of the supplemental testimony of their direct cases in prepared form.

The supplemental hearings before me were held at the United States Courthouse in Vicksburg, Mississippi, on Monday through Friday, September 12-16, 1994. The hearings generated a supplemental record of 1,396 pages of testimony by 12 expert and lay witnesses and 235 exhibits.[9] Also, on September 15, accompanied by all counsel, I took another view of the Disputed Area, this time by automobile since the river was down to a stage of about ten feet above ordinary low water on the Vicksburg gage. At the conclusion of the supplemental hearings, counsel for the parties made closing arguments. The parties filed post-trial memoranda on October 13, with oral argument by telephone later that day, and filed additional memoranda on October 14 and 19. They submitted the case for decision upon the evidentiary record made in *Houston v. Thomas* before Judge Barbour and the supplemental evidentiary record made before me. *See* Appendix C for a listing of the contents of the combined evidentiary record. *See also* Appendix D for a listing of the successive

[9] The testimony and exhibits of E.C. Burkhardt, a supplemental witness for the Mississippi Parties, were received through a videotaped deposition and accompanying transcript (Exhs. P-SE-51A and P-SE-51).

maps, mosaics and aerial photographs of record showing Stack Island from 1879 to the present.

At all times counsel for the parties have worked diligently to bring this protracted boundary and title dispute to an early submission to this Court. I am much in debt for the courteous and thoroughly professional help given me by all counsel and also by all the very able expert witnesses who testified at the supplemental hearings.

C. The Issues in This Action.

The issues to be decided are:

(1) What is the location of the Louisiana-Mississippi State boundary along the Mississippi River in the vicinity of the Disputed Area?

(2) Should the Houston Group's claim of title to the Disputed Area be cancelled and held for naught, as against the State of Louisiana?

II. RECOMMENDATIONS

RECOMMENDATION A: The Louisiana-Mississippi State boundary along the Mississippi River between North Latitude 32° 49' 25" and North Latitude 32° 44' lies along the Austin Smith Line as defined by the latitude-longitude calls set forth in Appendix A to this Report.

The legal principles that govern the resolution of the boundary dispute in this case are well established. In all four of the prior cases that have involved the Mississippi River boundary between the States of Louisiana and Mississippi, all titled *Louisiana v. Mississippi*, this Court has

applied the Rule of the Thalweg. *See Louisiana v. Mississippi*, 466 U.S. 96 (1984); 384 U.S. 24 (1966), *reh'g denied*, 384 U.S. 958; 282 U.S. 458 (1931); and 202 U.S. 1 (1906). By that rule the river boundary between States lies along the main downstream navigational channel or thalweg and moves as that channel changes with the gradual processes of erosion and accretion. *See id.*, 466 U.S. at 100. That channel thus carries the name of "live thalweg." *See id.* To that general Rule of the Thalweg there is an Island Exception that is specifically applicable here. If there is a divided river flow around an island, the boundary thalweg once established on one side of the island remains on that side even though the main downstream navigation channel shifts, however gradually, to the other side of the island. *See Indiana v. Kentucky*, 136 U.S. 479, 508-09 (1890) (applying Island Exception to established boundary differing from live thalweg); *Missouri v. Kentucky*, 78 U.S. 395, 401 (1870). The obvious purpose of the Island Exception is to avoid disturbing a State's sovereignty over an island as a result of what may be repeated shifts in the main navigation channel. *Id.* The boundary channel or thalweg that becomes "frozen" on one side of the island by application of the Island Exception is still ambulatory in that the State boundary thereafter moves to whatever extent the boundary channel moves on that side of the island. *See Arkansas v. Tennessee*, 397 U.S. 88, 90 (1970); *Arkansas v. Tennessee*, 246 U.S. 158, 175 (1918). That movement of the State boundary ceases, however, when and if water no longer flows along the boundary thalweg. *Id.* At that time the state boundary becomes fixed along what has become a "dead" thalweg.

A river island is physically subject to erosion that reduces its size and to accretion that increases its size, and the combination of those natural forces can over time work physical changes in both the area and the location of the island. A State's sovereignty over an island extends to accretions to the island. *See, e.g., Hogue v. Stricker Land & Timber Co.*, 69 F.2d 167, 168-69 (5th Cir. 1934), *on reh'g*, 70 F.2d 722 (5th Cir.), *cert. denied*, 293 U.S. 591 (1934) (Louisiana-Mississippi boundary fixed as between private parties). Provided that an island maintains a continuous existence, a State's sovereignty over it remains undisturbed as it changes in size and location as a result of accretion net of erosion. *Id.*

Determining the answer to the boundary question in this action requires an examination of both the prior and the subsequent history of the Stack Island that the U.S. General Land Office surveyed for patenting in 1881. The island's history, both before and after 1881, can be charted with confidence from the numerous maps and other documentary evidence in the record. A map dated 1765 shows an island at the Stack Island location. The island, later designated Island No. 94, reportedly washed away overnight in the great New Madrid earthquake of 1811, but within a few years willows were growing on the reforming island. The 1826-27 land survey of what is now Mississippi's Issaquena County (Exh. P-1) included Stack Island, while a similar survey two years later of what is now Louisiana's East Carroll Parish (Exh. P-2) did not include it. Charts and navigational publications from then until the 1881 patent survey of Stack Island are consistent with the continued existence of Stack Island as a land mass throughout the period. *See, e.g.*, Exhs. LA-

SE-6; LA-SE-110; P-SE-6. The island's long-term continuity, moreover, is confirmed by the presence there in 1881 of large trees, including a cottonwood with a 40-inch diameter, which E.C. Burkhardt, a professional forester, testified made it 60 to 70 years old at that time. *See* Exh. P-SE-51 (Burkhardt dep.) at 30-32; Exh. 2 to Burkhardt dep. at 5.

The best evidence places the main downstream navigation channel, and therefore the State boundary, on the west side of Stack Island throughout its history into the 1870s. Maps of 1867 and 1874 show a sandbar connecting Stack Island to the Mississippi bank. *See* Exhs. LA-SE-3; LA-SE-5. From those maps experts testifying for the State of Louisiana at the supplemental hearings concluded that the 1881 Stack Island had then only recently separated from the Mississippi shore. In any event, the Louisiana experts now acknowledge that the 1881 Stack Island had formed within the State of Mississippi. *See, e.g.*, 3 Sup. Tr. 313-15 (Easterly cross-exam.). Consistent with that view, the 1881 survey by the U.S. General Land Office showed Stack Island as a part of the State of Mississippi (Exh. P-7), and the island was patented in 1888 to Stephen B. Blackwell as land located in Issaquena County, Mississippi (Exh. P-41).

Houston v. Thomas was tried both before Judge Barbour and on appeal to the Fifth Circuit on the assumption that the location of the main navigation channel in 1881 (i.e., before the 1882-83 construction of dikes reinforced the channel to the west of Stack Island) was the critical issue in determining which State had sovereignty over Stack Island. Judge Barbour found that the 1881 main navigation channel lay to the west of the island and

consequently held for the Mississippi Parties. The Fifth Circuit held that the trial court's finding as to the location of the 1881 main channel was clearly erroneous and substituted its own finding that the main channel (and boundary thalweg) lay to the east, thereby holding for the State of Louisiana. *See Houston v. Thomas*, 937 F.2d at 251-52.

In truth, as the parties now recognize, which State had sovereignty over the 1881 Stack Island was established at the time of the statehood of Louisiana (1812) or Mississippi (1817) if the island was in existence on either date and, if not, at the time thereafter when the island formed. If the Mississippi Parties are correct that Stack Island formed at least 60 years prior to 1881, the maps and other evidence show that the established boundary thalweg lay to the west, thus putting Stack Island in Mississippi. If the State of Louisiana is correct in its present view that Stack Island had newly separated from the Mississippi shore in the late 1870s, the pre-existing main navigation channel by definition lay to the west of the land formation that constituted Stack Island, which would on separation continue to be in Mississippi; in other words, once Mississippi land, always Mississippi land. Thus, it is now apparent that the location of the 1881 main downstream navigation channel is a non-issue. On whichever side of the island the main channel ran at the time of the patent survey, the boundary thalweg lay on the west side, making the Stack Island surveyed in 1881 a part of the State of Mississippi.

Given the Louisiana experts' recognition that the 1881 Stack Island was Mississippi territory, the location of the State boundary in the vicinity of the Disputed Area is

now seen to depend on the answer to a single question of fact: Is the Disputed Area of today the result of the progressive transformation of Stack Island from its 1881 location and area to its present location and area by the natural river forces of accretion and erosion? That identity question was the subject of extensive expert and lay testimony and many map and documentary exhibits in the hearings before Judge Barbour. On the basis of that extensive record, Judge Barbour found as a fact that the Disputed Area is indeed the present-day form of the 1881 Stack Island as progressively changed by the processes of accretion and erosion, stating:

> It is clear from the Louisiana exhibits themselves, LA-21, 27, and 29, that there has always been a land mass from 1881 to the present time which map by map can be traced from the original Stack Island. It is interesting to note that this very active stretch of the river between 1881 and the present eroded the west bank of the river in the Lake Providence area by up to a mile and that it from time to time has placed and removed not only substantial sand bars but whole islands. Throughout this time period, however, substantial remnants of the original Stack Island have existed. In fact, Stack Island started out as some 700 acres[10]. According to one survey it grew to a substantial but undetermined acreage. It reduced and then in the 1970s it was back up in the range of 4,000 acres. At the present time the land mass claimed by the [Houston Group] is of approximately 2,000 acres. During all of this time, however, some

[10] Apparently a transcription error. The area of Stack Island when surveyed in 1881 was 117.96 acres.

> portion of Stack Island has remained above the low water mark and can be traced to an earlier map.

Barbour Bench Opn. at 16-17. Although the Fifth Circuit on appeal disagreed with Judge Barbour on the question of the location of the main navigation channel in 1881 (a fact question that we now see was irrelevant), it did not disturb the trial judge's finding of fact on the identity question. *See Houston v. Thomas*, 937 F.2d 247.

With the benefit of the full record made in *Houston v. Thomas* and also the supplemental record of five days of testimony and a great many additional exhibits, I have independently come to the same conclusion as Judge Barbour. Contrary to the contention of the State of Louisiana, Stack Island at no time since 1881 has completely washed away. Rather, it has continuously maintained its identity while being gradually transformed in location and area into what we here call the Disputed Area. During that transformation process the boundary channel lying on the Louisiana side of Stack Island (which became a secondary channel when the main navigation channel in the period 1909 to 1913 shifted to the other side of Stack Island) moved southwestward toward the Louisiana bank until it ceased in about 1954 to carry a flow of water at the river's low water stage, permanently fixing the boundary between the two States at that location.

The history of Stack Island subsequent to 1881 is detailed in a large number of maps, mosaics and aerial photographs admitted in evidence in *Houston v. Thomas* and an equally large number of additional exhibits admitted in the supplemental hearings, along with extensive testimony by experts from both sides interpreting the

exhibits. Austin B. Smith, the Mississippi Parties' expert in potamology and boundary determination, who testified in both *Houston v. Thomas* and before me, has had personal knowledge of Stack Island, and what we in this litigation call the Disputed Area, since 1928. His expert opinion, on the basis of the map evidence from the earliest mapping of Stack Island through 1954 and beyond, as well as his own personal knowledge since 1928, is that Stack Island has maintained its identity continuously since before 1881, having been transformed by accretion and erosion into what is now the Disputed Area affixed to the Louisiana bank. *See, e.g.*, transcript of the trial in *Houston v. Thomas* (hereafter "Tr.") at 361-63, 391-92 (A. Smith test.); Exhs. P-37A-1, P-37B-1; Exh. P-PT-2 (A. Smith prep. test.) at 5-8. He pointed out – and a Louisiana expert confirmed on cross-examination – that when maps of the Lake Providence Reach starting with the 1881 patent survey and coming down to the present era are overlaid on one another in chronological order, each successive map is seen to show a land mass covering a significant portion of the Stack Island shown on the next preceding map. *See* Exh. P-SE-50; 3 Sup. Tr. 139-76 (Winkley cross-exam.). Mr. Smith denied that the processes of accretion and erosion that changed the location and area of the 1881 Stack Island had at any time washed the island away. *See* Tr. 339 (A. Smith test.); Exh. P-PT-2 (A. Smith prep. test.) at 7-8.

At the hearings both before Judge Barbour and before me, the State of Louisiana presented expert testimony in an attempt to prove from the historical data that Stack Island did completely wash away on at least one occasion since 1881. The late Hatley N. Harrison, Jr., an expert in

the fields of potamology, civil engineering and boundary surveys, and Dr. Ernest S. Easterly, III, an expert in alluvial geomorphology and political geography, testified before Judge Barbour for the State of Louisiana. Before me, Dr. Easterly again testified and the State of Louisiana presented two new expert witnesses, Brien R. Winkley, an expert in the fields of river engineering, geology, river hydrology and potamology, and Michael P. Mayeux, a professional land surveyor who is experienced in locating boundaries. In my judgment Louisiana's evidence falls short of proving that Stack Island ever completely washed away at any time since 1881.

As a result of an unexpected development during the supplemental hearings, the Louisiana experts focused particularly on April 1883 as the date of the elimination of Stack Island. They based their claim on a surprise exhibit purporting to be a Mississippi River Commission hydrographic map of Stack Island dated in that month. That exhibit (Exh. LA-SE-159-ORIG.) had not been prefiled and was not presented by Louisiana's counsel, but rather was volunteered by Mr. Winkley in the course of his cross-examination by Mississippi's counsel, he having been handed it at the noon recess by another Louisiana witness, Mr. Mayeux. Overlaid on the map is a solid green line labeled as the "present steamboat channel"; that green line is placed to run across the outline of the 1881 Stack Island shown also on the exhibit. Mr. Winkley interpreted that green line and the hydrographic data displayed on the map to mean that Stack Island had in April 1883 completely disappeared, with the navigation channel passing over the middle of where the island once had been. *See, e.g.*, 3 Sup. Tr. 178-82, 207-13 (Winkley

cross-exam.). Even assuming the authenticity of the surprise exhibit, however, it would appear that boats could pass close to Stack Island without all of the island having washed away; indeed, the map shows a navigation light on the west shore of the island. *See* 4 Sup. Tr. 144-58 (Mayeux cross-exam.); 5 Sup. Tr. 84-86 (A. Smith test.).

In addition, the authenticity of the original parchment map, the only such original presented in evidence in this case, is not beyond dispute. Apparently, no such map was ever published by the Mississippi River Commission, its purported sponsor. *See* 5 Sup. Tr. 176-79 (A. Smith test.). On the other hand, the Commission did publish a different map of Stack Island and its vicinity dated in that same month of April 1883. That published map of April 1883, a copy of which the Mississippi Parties prefiled in this action as Exhibit P-SE-23, shows Stack Island very much in existence. The supposed disappearance of Stack Island in April 1883 is further contradicted by the sworn testimony given on May 5, 1885, by Stephen B. Blackwell and two other witnesses that Blackwell and his family had lived on Stack Island continuously from April 2, 1882, to the date of the testimony and had 20 acres under cultivation. *See* Exh. P-SE-20. Still further, in November 1883 the Mississippi River Commission in reporting on its construction of dikes just north of Stack Island does not mention the supposed elimination of Stack Island, but on the contrary states that:

> this work showed good results, forcing the main channel of the river to the right of the island and building a bar to the head of Stack Island, as shown by the high-water survey of April 1883.

Exh. LA-18A at 425. In sum, there is no satisfactory proof that Stack Island completely washed away in April 1883. In fact, the only reliable evidence is to the contrary.

The Louisiana expert witnesses do not point to any other map that convincingly shows the disappearance of Stack Island since 1881. They, for example, identify 1948 as another year when they claim Stack Island completely washed away. 2 Sup. Tr. 262-68 (Winkley test.); 4 Sup. Tr. 158-67 (Mayeux cross exam.). No such dramatic occurrence, however, is reported by local observers living at that relatively recent time, and the alleged destruction of Stack Island in 1948 is rebutted by the fact that today, in 1994, there are growing on the high ridge area in the north portion of the Disputed Area (at a location occupied by the 1948 Stack Island) cottonwood trees of an age of 60 to 70 years. *See* Exh. P-PT-1 at 4 (Jarvis prep. test.); Exh. P-SE-51 (Burkhardt dep.) at 32. *See also* 4 Sup. Tr. 167 (Mayeux cross-exam.) (Stack Island five feet above "ordinary high-water mark" in 1949).

The Lake Providence Reach in which Stack Island is located has been regularly mapped at frequent intervals ever since the Mississippi River Commission in the early 1880s undertook the construction of dikes at the head of Stack Island as one of its first two projects for improving navigation on the river. Every available map shows the continued existence of Stack Island from before 1881 until accretion caused it to merge into the Louisiana bank in about 1954. Appendix D lists the numerous maps, mosaics and aerial photographs showing the Lake Providence Reach since 1879 that are contained in the voluminous record of this case. With the exception of one single exhibit dated 1970, all of the maps and mosaics, one after

the other, show a land mass that the mapmaker specifically identifies by name as Stack Island, even for the years since 1954 when that land mass has no longer been insular in form. Furthermore, the long-term use in the community of the name "Stack Island" to refer to what in this litigation we now call the Disputed Area,[11] *see, e.g.*, 1 Sup. Tr. 24 (J. Smith cross-exam.); 1 Sup. Tr. 74-75 (House cross-exam.), strongly confirms the conclusion that I find inescapable from examination of all of the maps, mosaics and aerials listed in Appendix D: Stack Island never washed away, and it now is the Disputed Area.

As one support for their claim that Stack Island at various times disappeared or washed away, Louisiana's experts at the supplemental hearings urged the use of a single demanding test for whether a river land formation maintains its status as an island. Mr. Winkley first testified that to be an island a land formation must be higher than the top bank of the river (2 Sup. Tr. 188-89; 266), and then later offered Mr. Mayeux's surveyor's test that the formation must be higher than mean, or ordinary, high water (3 Sup. Tr. 119-20; 239-40). *See also* Exh. LA-PT-2 at 16 (Easterly prep. test.) ("mean high water"). For the

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[11] A large island sometimes called Rabbit Island formed in the 1960s and 1970s on the Mississippi side of the river northeast of the Disputed Area. The earliest map in this record that labels that new island "Stack Island" is dated 1970. *See* Exh. LA-1. Many, but not all, subsequent maps label the new island "Stack Island," but without exception all subsequent maps in the record give the "Stack Island" name to the Disputed Area. *See, e.g.*, Exh. P-32 (1975 map labeling only the Disputed Area as "Stack Island"); Exh. P-SE-40 (1988 map labeling both the Disputed Area and the new island as "Stack Island").

purpose of analyzing this voluminous record I have assumed that Stack Island must satisfy the "mean high water test" in order to qualify as an island. Even when analyzed on that assumption, however, this record reveals no map or other evidence that convincingly establishes that for any significant period since 1881 Stack Island has been without some land that had an elevation above mean high water. *See, e.g.*, 2 Sup. Tr. 229, 243-44, 255-56 (Winkley test.) (no precise elevation data for Stack Island for 1908, 1925, 1946); *compare, e.g.*, 2 Sup. Tr. 262-63 (Winkley test.) (Stack Island below "ordinary high water" in 1948-49) *with* 4 Sup. Tr. 165-67 (Mayeux cross-exam.) (no precise elevation data for Stack Island for April-May 1948; Stack Island five feet above "ordinary high-water mark" in 1949).

Furthermore, for the purposes of applying the Island Exception and of tracing real estate title from the 1881 Stack Island to the Disputed Area, a single mean high water test should not, in my judgment, be used mechanically or exclusively. A broader, more practical test is one that focuses on the degree of permanence of the river land formation. Stack Island's elevation in relation to mean high water is but one measure of its permanence, along with other factors such as its ability to sustain substantial vegetation and its dryness for much of the year. The fact that Stack Island on occasions has been flooded and from time to time has suffered erosion on its margins does not detract from its basic permanence and continuity, which mapmakers, river navigators and the local community have steadily recognized since the 1820s. *See* Appendix D. Failure to recognize Stack Island

as an "island" for purposes of the Island Exception, moreover, would fly in the face of the policy favoring certainty and stability that underpins the rule. Were Stack Island not classified as an "island," State sovereignty over this continuously existing land mass would change with every shift in the main navigation channel from one side to the other. *City of St. Louis v. Rutz*, 138 U.S. 226 (1891), does not teach anything to the contrary. By no means can Stack Island, which has continuously existed for at least 170 years, be called "a mere moving mass of alluvial deposits." *Id.* at 251 (*quoting Carrick v. Lamar*, 116 U.S. 423, 425 (1886)). By any practical test Stack Island has continuously qualified as an island for purposes of applying the Island Exception, and no convincing evidence exists in this record that use of a mean high water test requires a different result.

At the outset of his testimony, Mr. Winkley gave a highly informative illustrated lecture on the science of potamology, both generally and specifically as applied to the Lake Providence Reach. He testified that river islands and bars cyclically appear and disappear at about the same locations, suggesting that it was unlikely that Stack Island would survive the natural life-and-death pattern of land formations in the river. *See, e.g.*, Exh. LA-PT-1 (Winkley prep. test.) at 5-7; 2 Sup. Tr. 228-32 (Winkley test.). His expert opinion as to what *might* or even *should* have happened to Stack Island, however, cannot overcome what *did* happen to Stack Island as shown uninterruptedly by the succession of maps through the years from 1881 until beyond the time when water ceased to flow between the tranformed Stack Island and the Louisiana shore. *See* Appendix D.

In his prepared testimony Mr. Winkley also stated his opinion that it was impossible for Stack Island to "migrate" to the Louisiana side of the river, giving as his reason that "Stack Island could not have possibly . . . migrated across an active channel[.]" Exh. LA-PT-1 at 35 (Winkley prep. test.). From Mr. Smith's testimony and the map evidence, however, I do not understand that the changes produced by accretion and erosion in the location and area of Stack Island involved any crossing of an active channel. Rather, the accretions to the west and south sides of Stack Island pressed the boundary channel westward until it silted up and no longer carried water. At all times during this process the main navigation channel of the Mississippi River remained well to the east of Stack Island, where it had shifted in the period 1909 to 1913. *See* Exhs. LA-SE-12 through LA-SE-23.

A final question remains: Is the whole Disputed Area derived from the Stack Island surveyed in 1881? I conclude that the answer is in the affirmative. From time to time in the 1930s and 1940s, maps of the Lake Providence Reach displayed one or more sandbar features of varying configurations at the toe of Stack Island to the north. Well before 1954, when the boundary thalweg west of Stack Island dried up, those sandbar features had merged into Stack Island as accretions to its southern end. *See, e.g.*, Exhs. LA-27, LA-SE-21 (maps of 1950). Mr. Smith testified at length on the nature of the sandbars and on whether they had formed on the Mississippi or Louisiana side of the boundary thalweg. He stated, and illustrated by his exhibits, his expert opinion that the boundary thalweg ran down the west side of Stack Island and continued on down along the Louisiana bank to a point below the

sandbars where the boundary thalweg met the main navigation channel; in other words, on the west of the sandbars forming at the toe of Stack Island. *See* Exhs. P-17 through 26; P-33 through 35. He explained that the sandbars and the later accretion to Stack Island resulted from the confluence flow around the island. *See, e.g.*, Tr. 328-89 (A. Smith test.). Thus, it was Mr. Smith's opinion that the sandbars formed in Mississippi and were Mississippi territory both then and later when they accreted to Stack Island. At the supplemental hearings, Mr. Smith repeated his analysis, explaining that the growth of Stack Island downstream represented "progressive formation of confluence flow accretion as a result of the bifurcated flow of the Mississippi River at Stack Island." *See* Exh. P-PT-2 at 8. Before me, the State of Louisiana presented no evidence to the contrary, satisfying itself with claiming that Stack Island had not enjoyed a continuous existence and that there was never any frozen boundary thalweg west of Stack Island. Louisiana presented no evidence that the point of confluence between the boundary thalweg and the main navigation channel was anywhere other than at a point downriver from the sandbars accreted to Stack Island. When the Louisiana-Mississippi boundary became fixed in about 1954, it was established along the entire west bound of Stack Island as it then existed, including all prior accretions to the southern end.[12] On the full

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[12] On the basis of the record in *Houston v. Thomas*, Judge Barbour reached the same factual conclusion. Barbour Bench Opn. at 19-21. He stated:

> It appears logical to the Court that the formations south of what might be called Stack Island proper were accretions caused by the flow around that island, and that until they actually attached to the island they were sand bars and were not permanent land masses. The only thing to the contrary is the testimony of Mr. Harrison who claimed them to be islands. This claim, however, was made on the basis of the charts, which were navigation charts which clearly called those formations sand bars. The Court, accordingly, concludes that the entire land mass claimed by the Plaintiff is Stack Island and accretions thereto including the southerly end of it which runs down past the Port Commission.

Id. at 21.

record, I find that the entire Disputed Area lies to the east of the State boundary.

Having thus determined *what* is the Louisiana-Mississippi State boundary in the vicinity of the Disputed Area, it remains to determine *where* that boundary is located on the face of the earth. Prior to the filing of the complaint in *Houston v. Thomas* in 1986, Mr. Smith identified what he believed to be the location of the boundary thalweg at the time that he found it ceased to carry flowing water. *See* Complaint, *Houston v. Thomas* ¶ 52. In his 1989 decision Judge Barbour approved the Austin Smith Line as the State boundary, and nothing in the supplemental hearings leads me to recommend rejection of that line. The State of Louisiana does not present any affirmative evidence on the subject, and its demonstration on cross-examination of the fact that Mr. Smith sponsored a somewhat different boundary line in the *Gypsum* litigation (*see* note 3 above) commenced 13 years earlier does not necessarily impeach the accuracy of his later effort. *See* 5 Sup. Tr. 108-10 (A. Smith cross-exam.); Exh. LA-SE-142. Mr. Smith explained that in the earlier case he

had relied upon the findings of another land surveyor for placing the boundary on the face of the earth, whereas he had made his own determination for *Houston v. Thomas*. *See* 5 Sup. Tr. 104-06, 110 (A. Smith cross-exam.). On this record I conclude that Mr. Smith, in laying out the Austin Smith Line as the Louisiana-Mississippi State boundary, did as precise and expert a job as the circumstances permit. I therefore recommend that the Court declare that the Louisiana-Mississippi State boundary along the Mississippi River between the latitudes of Mr. Smith's Points 1 and 22 (*see* Appendix A) is located as he determined.

RECOMMENDATION B: The Court should deny the prayer of the State of Louisiana to cancel and forever hold for naught the Houston Group's claim of title to the Disputed Area.

In its Complaint the State of Louisiana asks this Court to cancel the Houston Group's claim of title to the Disputed Area. Louisiana grounds this prayer for relief on its fundamental premise that the Disputed Area quite simply is not "Stack Island" because the island or islands deeded in 1888 and in 1934 to the Houston Group's predecessors-in-title have since completely washed away. Having concluded as a fact that Stack Island has indeed maintained its identity continuously since 1881 and been transformed in area and location into the present Disputed Area, I correspondingly recommend denial of Louisiana's prayer for cancellation of the Houston Group's claim of title.

By my recommendation on the boundary issue the Disputed Area is located within Mississippi, and therefore the State of Louisiana by its prayer for relief against the Houston Group seeks to cancel a claim to Mississippi land. The State of Louisiana puts forth three alternative arguments under Mississippi law for cancelling the Houston Group's claim:

> 1. The 1888 patent to Stephen B. Blackwell was void *ab initio* because Mississippi riparian landowners, and not the United States, owned Stack Island.
>
> 2. Under Mississippi law, the 1934 tax foreclosure deed to the Houston Group's predecessor suffered from a fatally inadequate description.
>
> 3. Under Mississippi law, record title to some or all of the southern accretions to Stack Island rests in Mississippi riparian landowners, not in the Houston Group.

These collateral challenges suffer from a common, fatal flaw: The State of Louisiana lacks standing to assert them. Itself a stranger to the title, the State of Louisiana seeks to cancel the Houston Group's claim on the strength of the alleged paramount title of some unidentified third party or parties. This the State is in no position to do. *See, e.g., St. Louis Smelting & Refining Co. v. Kemp*, 104 U.S. 636, 647 (1881) ("[i]t does not lie in the mouth of a stranger to the title to complain of the act of the government with respect to it"); *Raypath, Inc. v. City of Anchorage*, 544 F.2d 1019, 1021 (9th Cir. 1976) ("[a]s a matter of federal law, it is well established that the validity of a deed or patent from the federal government

may not be questioned in a suit brought by a third party against the grantee or patentee").

This Court need go no further to dispose of the title question in this action. Nonetheless, in view of the fact that these attacks on the Houston Group's claim of title are pressed by a sovereign State, I will quickly outline why they lack merit in any event.

First, Louisiana claims that Stack Island when surveyed in 1881 was not in the federal public domain because it had not formed in Mississippi until after Mississippi's statehood in 1817. Under Mississippi law, Louisiana therefore reasons, the island became the property of Mississippi riparians, and the United States owned nothing that it later could convey. This challenge should be rejected both on the ground that federal land patents enjoy a presumption of validity, *see, e.g., Kemp*, 104 U.S. at 645 (Land Department's determination of fact upon which its authority to issue patent depends is conclusive against any collateral attack), and on the ground that the attack, which comes 106 years after the issuance of the patent and 177 years after Mississippi statehood, is time-barred on a laches principle,[13] *see, e.g., Wetzel v. Minnesota Ry. Transfer Co.*, 169 U.S. 237, 241 (1898) (noting, in barring challenge to validity of patent transfer after 30-year lapse, that "interests of public order and tranquillity demand that parties shall acquaint themselves with their

[13] On October 3, 1994, the Court granted the motion of the Houston Group to file a supplemental answer to assert as an affirmative defense that the State of Louisiana's challenge to the validity of the 1888 patent was time-barred. *See* 63 U.S.L.W. 3256 (Oct. 4, 1994).

rights within a reasonable time"); *United States v. Marshall Silver Mining Co.*, 129 U.S. 579, 588 (1889) (alternative holding that United States barred by laches from challenging validity of patent issued in 1874).

Second, contrary to the contention of the State of Louisiana, the description in the 1934 tax foreclosure deed of the conveyed property as Stack Island, containing 1,000 acres and situated in Issaquena County, Mississippi, with a handwritten notation that the property was approved for reconveyance to its former owner (Exh. P-46), is legally adequate to identify what had been foreclosed upon and what was being conveyed back to the delinquent taxpayer. Despite reference to an allegedly nonexistent Section 27, and despite the fact that the island through erosion and accretion had moved off its original township calls, anyone could have located this particular Mississippi River island with certainty. *See, e.g., Wilson v. Clark*, 278 So.2d 250, 254 (Miss. 1973) ("[o]ne of the essentials of a valid deed is a description sufficient to identify the object upon which the deed is to operate"); *Seal v. Anderson*, 108 So.2d 864, 866 (Miss. 1959) (description of nonexistent "Township 10," rather than true "Township 10 North," adequate to convey title when accompanied by identification of county in which land located).

Finally, the State of Louisiana correctly states that under Mississippi law lengthwise accretions to Stack Island belong to Mississippi riparians to the extent that those accretions cross the riparians' extended property lines. *See, e.g., Houston v. United States Gypsum Co.*, 569 F.2d at 883-84, *on reh'g*, 580 F.2d at 818. In fact, in the cited case the court applied the Mississippi rule specifically to

the southern portion of Stack Island, as against the Houstons and in favor of U.S. Gypsum, a substantial riparian landowner on the Mississippi bank below the 1881 location of Stack Island. *See* note 3 above. On remand, however, the trial court found that the Houstons had acquired title to the southern portion of Stack Island by adverse possession – a holding that was affirmed on appeal. *See Gypsum*, 652 F.2d at 467. The State of Louisiana does not identify any potential Mississippi riparian claimants to Stack Island other than U.S. Gypsum, and none has appeared here. In any event, the State of Louisiana cannot assert the claim of any such hypothetical litigant.

The State of Louisiana has shown no basis for the Court, at its behest, to cancel the Houston Group's claim of title to the Mississippi land in dispute in this action.

III. CONCLUSION

The Boundary Question. The Disputed Area represents the present configuration and location of the Stack Island that was surveyed by the United States in 1881 and patented to Stephen B. Blackwell in 1888. Stack Island was then Mississippi territory, and it has continued to exist as Mississippi territory at all times while accretion and erosion have caused the island to change in size and to move gradually toward the Louisiana bank. The Louisiana-Mississippi State line on the west of the "transformed" Stack Island is fixed at the location of the boundary thalweg when it ceased to carry a flow of water at the ordinary low water stage in about 1954. This record

satisfactorily establishes that the Austin Smith Line described by latitude-longitude calls in Appendix A defines the location on the face of the earth of that State boundary as so fixed.

The Title Question. Once it is determined that the Disputed Area lies within Mississippi, the State of Louisiana fails to establish any ground whatever for this Court, at Louisiana's behest, to cancel the Houston Group's claim of title to that Mississippi land. The State of Louisiana's prayer should be denied.

A proposed Decree embodying my recommendations is attached as Appendix E.

Respectfully submitted,

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Special Master
One Monument Square
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October 24, 1994

APPENDIX A

Description of the "Austin Smith Line," claimed by the Mississippi Parties to be the Louisiana-Mississippi State Boundary (Points being those shown on Exhibits P-32D and LA-1A):

Beginning at Pt. 1 at North Latitude 32° 49' 25" and West Longitude 91° 09' 27"; thence to Pt. 2, Latitude 32° 49' and Longitude 91° 09' 34"; thence to Pt. 3, Latitude 32° 48' 47" and Longitude 91° 09' 37"; thence to Pt. 4, Latitude 32° 48' 30" and Longitude 91° 09' 39"; thence to Pt. 5, Latitude 32° 48' and Longitude 91° 09' 47"; thence to Pt. 6, Latitude 32° 47' 18" and Longitude 91° 09' 51"; thence to Pt. 7, Latitude 32° 47' 6" and Longitude 91° 09' 54"; thence to Pt. 8, Latitude 32° 47' and Longitude 91° 09' 59"; thence to Pt. 9 Latitude 32° 46' 50" and Longitude 91° 10' 7"; thence Pt. 10, Latitude 32° 46' 35" and Longitude 91° 10' 14"; thence to Pt. 11, Latitude 32° 46' 20" and Longitude 91° 10' 16"; thence to Pt. 12, Latitude 32° 46' and Longitude 91° 10' 18"; thence to Pt. 13, Latitude 32° 45' 45" and Longitude 91° 10' 20"; thence to Pt. 14, Latitude 32° 45' 30" and Longitude 91° 10' 18"; thence to Pt. 15, Latitude 32° 45' 15" and Longitude 91° 10' 12"; thence to Pt. 16, Latitude 32° 45' and Longitude 91° 10' 01"; thence to Pt. 17, Latitude 32° 44' 45" and Longitude 91° 09' 49"; thence to Pt. 18, Latitude 32° 44' 30" and Longitude 91° 09' 38"; thence to Pt. 19, Latitude 32° 44' 23" and Longitude 91° 09' 30"; thence to Pt. 20, Latitude 32° 44' 15" and Longitude 91° 09' 18"; thence to Pt. 21, Latitude 32° 44' 07" and Longitude 91° 09'; thence to Pt. 22, Latitude 32° 44' and Longitude 91° 08' 44".

See also Paragraph 5 of Mississippi's Counterclaim and Exhibit P-32E.

APPENDIX B

Description of the "Hatley Harrison Line," previously claimed by the State of Louisiana in *Houston v. Thomas* to be the Louisiana-Mississippi State Boundary (Points being those shown on Exhibits LA-1A and LA-32F-1):

> Beginning at Pt. A at North Latitude 32° 51' 09."06 and West Longitude 91° 07' 03."03; thence to Pt. B, Latitude 32° 49' 35."34 and Longitude 91° 07' 39."01; thence to Pt. C, Latitude 32° 49' 23."38 and Longitude 91° 07' 44."47; thence to Pt. D, Latitude 32° 49' 12."81 and Longitude 91° 07' 51."07; thence to Pt. E, Latitude 32° 48' 40."09 and Longitude 91° 08' 30."81; thence to Pt. F, Latitude 32° 48' 32."28 and Longitude 91° 08' 40."89; thence to Pt. G, Latitude 32° 48' 20."52 and Longitude 91° 08' 52."19; thence to Pt. H, Latitude 32° 47' 41."28 and Longitude 91° 09' 24."40.

At the conclusion of the supplemental hearings in this original jurisdiction action, counsel for the State of Louisiana stated that the State of Louisiana now contends that the Louisiana-Mississippi boundary in the vicinity of the Disputed Area lies along the live thalweg. *See* 5 Sup. Tr. 207 (Louisiana's Closing Arg.).

APPENDIX C

CONTENTS OF THE EVIDENTIARY RECORD IN THIS ACTION

By stipulation of the parties, the evidentiary record in this original jurisdiction action consists of the following:

1. The record of the hearings held on June 19-23 and October 2, 1989, before Judge Barbour in the Southern District of Mississippi in *Houston v. Thomas*, including the following:
   a. The 961-page transcript of the testimony of 24 witnesses;
   b. 122 exhibits offered by the Mississippi Parties identified as Exhibits P-1, *etc.*
   c. 52 exhibits offered by the State of Louisiana identified as Exhibits LA-1, *etc.*
   d. 35 exhibits identified as DLB-1, *etc.*, offered by the Board of Commissioners of the Fifth Louisiana Levee District, which is not a party in this original jurisdiction action.
2. The record of the supplemental hearings held before the Special Master on September 12-16, 1994, consisting of the following:
   a. Prepared testimony prefiled by 11 witnesses, totaling 138 pages. The prefiled testimony of the 9 witnesses for the State of Louisiana is identified as Exhibits LA-PT-1, *etc.*, and that of the two witnesses for the Mississippi Parties as Exhibits P*-PT-1 and P-PT-2.

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*Although the Mississippi Parties are defendants in this original jurisdiction action, their exhibits are for convenience identified by the same "P" prefix as was used for their plaintiffs' exhibits in *Houston v. Thomas*.

b. The videotaped deposition of an expert witness for the Mississippi Parties, the 70-page transcript being identified as Exhibit P*-SE-51, and the tape as Exhibit P*-SE-51A.

c. The 1,326-page transcript of the testimony of 11 witnesses at the supplemental hearings.

d. 172 exhibits offered by the State of Louisiana identified as Exhibits LA-SE-1, *etc.*

e. 63 exhibits offered by the Mississippi Parties identified as Exhibits P*-SE-1, *etc.*

APPENDIX D

HISTORICAL MAPS, MOSAICS AND AERIALS SHOWING STACK ISLAND FROM 1879 TO PRESENT

YEAR	EXHIBIT NUMBER*	MAP, MOSAIC OR AERIAL	STACK ISLAND IDENTIFIED?
1879	P-5; LA-SE-6	Suter U.S. Corps of Engineers survey	Yes
1879-80	LA-SE-7	Mississippi River Commission (MRC) survey map	Yes
Aug. 1881	P-7; P-SE-50	U.S. General Land Office Survey Plat, Island No. 94, Stack Island	Yes
Oct.-Nov., 1881	P-8; P-SE-50	MRC chart of Lake Providence Reach, Marshall's Shoreline Survey Oct & Nov 1881	Yes
1881 - 93	LA-SE-96	MRC Early Stream Channels Map, Sheet 68	Yes
April 1882	P-SE-21	April 1882 MRC hydrographic survey	Yes
Oct. 1882	P-SE-22	October 1882 MRC hydrographic survey	Yes
1882	P-13; P-SE-50; LA-10	MRC 1882 Survey Charts 43 and 44	Yes
April 1883	P-SE-23	April 1883 MRC hydrographic survey	Yes
April 1883	LA-SE-159-ORIG.	Parchment original of 1883 hydrographic map	Yes
Oct. 1883	LA-18A	October 31, 1883 MRC construction works, Lake Providence Reach	Yes
1884	P-15; LA-SE-8*	MRC 1884 Hydrographic Survey, Sheet II	Yes

*On the asterisked exhibits, Mr. Winkley superimposed the names "Providence Bar" and/or " Stack Island." See Exh. LA-PT-1 at 36 (Winkley prep. test.).

1884	LA-SE-9*	Thompson MRC survey, July 1884	Yes
1889	P-SE-24; LA-SE-10*	May 31, 1889 MRC survey	Yes
1894	P-16	MRC 1894 Hydrographic Survey Sheets 19-20	Yes
1895	LA-SE-135	MRC map of the Lake Providence Reach	Yes
1881 to 1907	LA-SE-134	MRC map of the Lake Providence Reach	Yes
1901	LA-14	Sketch of Lake Providence Reach, 1901	Yes
1901-02	LA-SE-11	Potter map	Yes
1907	LA-15	Stack Island Chute - 2 plats, May and Dec., 1907	Yes
1907	LA-37A-1	Survey of Islands Claimed by Fifth Louisiana Levee District, 1907	No[1]
1908-09	P-17; P-SE-50; LA-SE-136	MRC 1908-1909 Bank and Bar Line Survey of Shipland Pt. Plantation	Yes
1909	LA-16A	Lake Providence Quad Edition 1909	Yes
1911	LA-16	Lake Providence Quad Edition 1911	Yes
1913-15	P-18; P-SE-50; LA-17; LA-SE-12*	MRC 1913-1915 Hydrographic Survey, Chart 45	Yes
1925	P-19; P-SE-50; LA-18; LA-SE-13*	MRC 1925 Hydrographic Survey, Field Sheets 80, 81	Yes
1930	P-20; P-SE-50; LA-19; LA-SE-137	U.S. Corps 1930 Low Water Survey of River, Sheets 66 & 69	Yes
1930-32	LA-SE-96	MRC Early Stream Channels Map, Sheet 8	Yes

[1]No land mass at the location of Stack Island is shown on this map.

1932	P-27	U.S. Corps 1932 Mosaic	Yes
1933	P-21; LA-SE-14*	U.S. Corps 1933 Hydrographic Survey	Yes
1934	LA-20	Flood Control & Navigation Map	Yes
1935	P-22; LA-SE-15*	U.S. Corps 1935 Hydrographic Survey	Yes
1935 1936	LA-21	Flood Control & Navigation Maps	Yes
1936	P-23; LA-SE-16*	U.S. Corps 1936 Hydrographic Survey	Yes
1937	P-24; P-SE-50; LA-22A; LA-SE-146	U.S. Corps 1937 Hydrographic Survey	Yes
1938	P-25	U.S. Corps 1938 Hydrographic Survey	Yes
1938	P-28	U.S. Corps 1938 Mosaic	Yes
1938 1939	LA-21	Flood Control & Navigation Maps	Yes
1939	LA-SE-17*	1939 Vicksburg (VXB) District Survey	Yes
1940	P-26	U.S. Corps 1940 Hydrographic Survey	Yes
1940 1941	LA-21	Flood Control & Navigation Maps	Yes
1941	P-29	U.S. Corps 1941 Mosaic	Yes
1942	LA-SE-18*	1942 VXB District Survey	Yes
1942 1943 1946	LA-21	Flood Control & Navigation Maps	Yes
1946	LA-SE-19*	1946 VXB District Survey	Yes

1947	LA-21	Flood Control & Navigation Map	Yes
1948	LA-SE-20*	1948 VXB District Survey	Yes
1948	LA-SE-148	1948 U.S. Corps Survey	Yes
1948 1949	LA-21	Flood Control & Navigation Maps	Yes
1949	P-SE-50; LA-23; LA-SE-147	1949 MRC Hydrographic Survey	Yes
1950	LA-SE-21*	1950 VXB District Survey	Yes
1950 1951 1952	LA-27	Flood Control & Navigation Maps	Yes
1952	LA-SE-22*	1952 VXB District Survey	Yes
1953 1954	LA-27	Flood Control & Navigation Maps	Yes
1955	P-30	U.S. Corps 1955 Mosaic	Yes
1955	P-SE-39	1955 Aerial Photograph, Disputed Area	N.A.
1955 1956	LA-27	Flood Control & Navigation Maps	Yes
1957	LA-27; LA-27A	Flood Control & Navigation Map	Yes
1958	LA-SE-23*	1958 VXB District Survey	Yes
1958 1959 1960 1961	LA-27	Flood Control & Navigation Maps	Yes
1962	LA-SE-24*	1962 VXB District Survey	Yes
1962 1963	LA-29	Flood Control & Navigation Maps	Yes

1962-1964	P-31; P-SE-50 LA-27B	U.S. Corps 1962-1964 Hydrographic Survey	Yes
1964 1965	LA-29	Flood Control & Navigation Maps	Yes
1965	P-SE-25	1965 Aerial Photograph, Disputed Area	N.A.
1966 1967	LA-29	Flood Control & Navigation Maps	Yes
1967	LA-SE-25*	1967 VXB District Survey	Yes
1968 1969 1970	LA-29	Flood Control & Navigation Maps	Yes
1970	LA-SE-26*	1970 VXB District Survey	Yes
1970	LA-1	Vicinity Map Composite of USGS 1970 Edition Quadrangles on which is imposed 1881 location of Stack Island	No[2]
1971	LA-29	Flood Control & Navigation Map	Yes
1975	P-32; P-SE-50; LA-30	U.S. Corps 1975 Hydrographic Survey	Yes
1975	LA-SE-27*	1975 VXB District Survey	Yes
1975	P-SE-27	1975 Aerial Photograph, Disputed Area	N.A.
1976	LA-31	Flood Control and Navigation Map	Yes
1983	LA-31; LA-SE-29*	Flood Control and Navigation Map	Yes
1985 1986	LA-31	Flood Control & Navigation Maps	Yes

[2]A land mass that formed in the 1960s to the northeast of the Disputed Area is here labelled "Stack Island."

1987	LA-32	Flood Control & Navigation Map	Yes
1988	LA-31; LA-32A	Flood Control & Navigation Map	Yes
1988	LA-32D	Hydrographic Survey - January 1988 - Sheets 1-3	Yes
1988	P-SE-29	1988 Aerial Photograph, Disputed Area	N.A.
1988-1989	P-SE-40; P-SE-50	1988-89 Mississippi River Hydrographic Survey	Yes
1991	P-SE-30	1991 Aerial Photograph, Disputed Area	N.A.
1992	LA-SE-30*	1992 MRC Navigation Map	Yes
1993	LA-SE-28*	1993 VXB District Survey	Yes
1994	LA-SE-31*	1994 VXB District Survey	Yes
1994	P-SE-31 A-E	1994 Aerial photographs, Disputed Area	N.A.
1994	P-SE-41 A-H P-SE-42 A-J	1994 Low-level aerial photographs, Disputed Area	N.A.

APPENDIX E

PROPOSED DECREE

STATE OF LOUISIANA v. STATE OF MISSISSIPPI, *et al.*

No. 121, Original

Decided _____ Decree Entered _____

Decree carrying into effect this Court's opinion of ___, ___ U.S. ___ (199___).

DECREE

This cause having come on to be heard on the Report of the Special Master heretofore appointed by the Court, and the exceptions filed thereto, and having been argued by counsel for the several parties, and this Court having stated its conclusions in its opinion announced on ___, ___ U.S. ___, and having considered the positions of the respective parties as to the terms of the decree, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED AS FOLLOWS:

1. The boundary between the State of Louisiana and the State of Mississippi along the Mississippi River between North Latitude 32° 49' 25" and North Latitude 32° 44' lies along the line described as follows:

> Beginning at Pt. 1 at North Latitude 32° 49' 25" and West Longitude 91° 09' 27"; thence to Pt. 2, Latitude 32° 49' and Longitude 91° 09' 34"; thence to Pt. 3, Latitude 32° 49' 47" and Longitude 91° 09' 37"; thence to Pt. 4, Latitude 32° 48' 30" and Longitude 91° 09' 39"; thence to Pt. 5, Latitude 32° 48' and Longitude 91° 09' 47"; thence to Pt. 6, Latitude 32° 47' 18" and Longitude 91° 09' 51"; thence to Pt. 7, Latitude 32° 47'

6" and Longitude 91° 09' 54"; thence to Pt. 8, Latitude 32° 47' and Longitude 91° 09' 59"; thence to Pt. 9, Latitude 32° 46' 50" and Longitude 91° 10' 7"; thence Pt. 10, Latitude 32° 46' 35" and Longitude 91° 10' 14"; thence to Pt. 11, Latitude 32° 46' 20" and Longitude 91° 10' 16"; thence to Pt. 12, Latitude 32° 46' and Longitude 91° 10' 18"; thence to Pt. 13, Latitude 32° 45' 45" and Longitude 91° 10' 20"; thence to Pt. 14, Latitude 32° 45' 30" and Longitude 91° 10' 18"; thence to Pt. 15, Latitude 32° 45' 15" and Longitude 91° 10' 12"; thence to Pt. 16, Latitude 32° 45' and Longitude 91° 10' 01"; thence to Pt. 17, Latitude 32° 44' 45" and Longitude 91° 09' 49"; thence to Pt. 18, Latitude 32° 44' 30" and Longitude 91° 09' 38"; thence to Pt. 19, Latitude 32° 44' 23" and Longitude 91° 09' 30"; thence to Pt. 20, Latitude 32° 44' 15" and Longitude 91° 09' 18"; thence to Pt. 21, Latitude 32° 44' 07" and Longitude 91° 09'; thence to Pt. 22, Latitude 32° 44' and Longitude 91° 08' 44".

2. The State of Louisiana's prayer that the claim of title by defendants Julia Donelson Houston, *et al.*, in and to the lands and water bottoms lying between the Mississippi River on the east and the Louisiana-Mississippi boundary line as fixed in the preceding paragraph on the west be cancelled and forever held for naught is DENIED.

3. The Court retains jurisdiction to entertain such further proceedings, enter such orders and issue such writs as may from time to time be deemed necessary or advisable to give proper force and effect to this decree or to effectuate the rights of the parties in the premises.

(8)

Supreme Court, U.S.
FILED
JAN 18 1995
CLERK

No. 121, Original

In The

Supreme Court of the United States

October Term, 1994

STATE OF LOUISIANA

Plaintiff,

v.

STATE OF MISSISSIPPI, et al.,

Defendants.

EXCEPTIONS OF THE STATE OF LOUISIANA TO THE FINAL REPORT OF THE SPECIAL MASTER AND PETITION FOR NEW TRIAL OF THE SUPPLEMENTAL HEARING

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No. 121, Original

In The

Supreme Court of the United States

October Term, 1994

STATE OF LOUISIANA

Plaintiff,

v.

STATE OF MISSISSIPPI, et al.,

Defendants.

EXCEPTIONS OF THE STATE OF LOUISIANA TO THE FINAL REPORT OF THE SPECIAL MASTER AND PETITION FOR NEW TRIAL OF THE SUPPLEMENTAL HEARING

I.

INTRODUCTION

Pursuant to Order entered by this Court on November 14, 1994, receiving the Report of the Special Master and granting permission for the filing of Exceptions, the State of Louisiana, through its Attorney General, files Exceptions to the determinations made by the Special Master. Additionally, the State of Louisiana files a Petition for New Trial of the Supplemental Hearing held before the Special Master in consequence of the Final Report rendered by him.

At the outset, it should be stated that this matter has been in progress since 1986 and the Final Report of the Special Mas-

ter provides an excellent review of the history of the case in the District Court, the Court of Appeals for the Fifth Circuit and this Court, including the testimony and exhibits introduced, as well as a detailed procedural history of this action.

As can be seen from Appendix "C" attached to the Final Report of the Special Master, the transcript of the Supplemental Hearings was more extensive than the original trial, and the additional exhibits offered were indeed voluminous. The Special Master, ably assisted by Ms. Susani Douville, did a careful job of the accessioning of these additional items of evidence and insured that they were correctly marked, identified and maintained during these proceedings.

Unfortunately, the Special Master has apparently misunderstood and, therefore, totally misconstrued the facts presented before him, much of which was a supplementation of prior testimony, but with many additional exhibits offered by Louisiana (which carefully and explicitly depicted the progression of events within the Lake Providence reach of the Mississippi River over the entire period of recorded history). In essence, the Special Master has returned this Court to the same posture the case was in at the time of the District Court decision, which was completely reversed by the Court of Appeals for the Firth Circuit, on August 5, 1991, by relying upon the original findings of the District Court. This, despite overwhelming evidence and testimony from supplemental witnesses for Louisiana of national and international standing (Dr. Easterly, Mayeux and Winkley), as well as lay witnesses. Mississippi and the Houston Group presented only two previous witnesses, Austin Smith and Robert Jarvis, and a forester.[1]

[1] The prepared testimony of the supplemental witnesses provides a foundation for the trial testimony to follow at the supplemental hearing on September 12, 1994.

As will be pointed out in the Exceptions below, the Special Master has committed clear error in the findings presented and has disregarded the essential meaning of the only conclusive pieces of evidence, as well as applicable law, which were available in formulating his final report. The Special Master, like the District Court, adopted the "Austin Smith Line" attached as Appendix "A" to the report, but there is no evidentiary foundation whatsoever for this claimed line of boundary. No data or evidence was produced to support this line at the original trial in the District Court in 1989, nor could Mr. Smith produce any data or evidence to support the line during the supplemental hearings, despite being given ample opportunity and after repeated requests on cross-examination for information of any type which might provide some possible documentary basis to support Smith's verbal opinion. Moreover, Smith admitted on cross-examination that his boundary line was between 7,000 to 8,000 feet (5 Sup. Tr. 100-128) too far to the west from the true thalweg in the various years that he from time to time picked in the two trials, 1949-54 (5 Sup. Tr. 111-120, 143, 146), to claim an avulsion had occurred. This error represents virtually the full width of the Mississippi River and very obviously means the Smith Line is in the wrong location, being located on top of the west bank (Louisiana) instead of adjacent to the east bank of the river (Mississippi).

In this regard, the Special Master neglected to mention that the "Austin Smith Line" follows along the Louisiana levee and transects property owned and occupied historically by Louisiana riparians who have farmed it since just after the turn of the century, as they testified in the Supplemental Hearing (Surles, House, and Walters). Similar testimony was offered in the original trial by Louisiana (Deloney, Reed, etc.), but Mississippi offered none. In truth and fact, no Mississippi people have ever had anything to do with the disputed area in Louisiana, except to try and hunt there. There have been no residences established, except by Louisianans, no farming ex-

cept by Louisianans, no law enforcement except by Louisiana Wildlife and Fisheries agents and the Louisiana sheriff, and no taxes paid on the disputed area except by Louisianans to the Louisiana tax collector in Lake Providence, Louisiana.

The findings and conclusions of the Special Master are not supported by the data and evidence, and applicable law is improperly applied. It is submitted that the Master was overwhelmed by the complexity of the evidence and apparently elected to follow the reasoning of the District Court or possibly some broadly conceived subjective notions of equity in lieu of confronting and giving proper analysis to the scientific and technical factual issues before the Court.

The parties have invested a huge amount of time, energy, resources and money on this matter and are entitled, therefore, to have a proper decision by application of the controlling rules of law to the proven facts.

II.

MOTION FOR ORAL ARGUMENT

The State of Louisiana, through its Attorney General, further moves the Court, in view of the importance of this litigation to Louisiana, that this case be set for oral argument after all briefs have been filed.

III.

PETITION FOR NEW TRIAL OF THE SUPPLEMENTAL HEARING

The State of Louisiana respectfully prays for a new trial of the Supplemental Hearing held before the Special Master appointed by the Court on March 7, 1994.

ARGUMENT

For the same reasons stated in the Exceptions to the Report

of the Special Master, it is shown that the Special Master has apparently misunderstood, and, therefore, totally misconstrued the facts presented before him, much of which was a supplementation of prior testimony by further very clear, explicit and detailed expert testimony of new Louisiana witnesses. Additionally, as shown by the Final Report of the Special Master, many additional exhibits were offered by Louisiana which carefully and explicitly depicted the progression of events within the Lake Providence Reach of the Mississippi River over the entire period of recorded history.

It is submitted that the case should be decided on proven facts supported by documentary evidence, based upon applicable rules of law and definition.

It is further submitted that there is no evidence to support the findings and interpretations of the Special Master as a consequence of testimony and evidence adduced at the Supplemental Hearing.

In view of the special importance of this litigation to Louisiana and the other parties, it is submitted that a new trial of the Supplemental Hearing should be granted in the interests of fairness, justice and equity for the parties.

IV.

EXCEPTIONS TO THE REPORT OF THE SPECIAL MASTER

The State of Louisiana excepts to the report of the Special Master now before this Court in the following particulars:

A.

The Special Master erred in finding that a frozen boundary thalweg may remain ambulatory and may be "pushed" by bar and shoal accretion building in the river. See pages 12 and 25 of the Final Report; footnote 3, infra, p.12.

B.

The Special Master erred in ignoring detailed hydrographic data and the unrefuted testimony of Louisiana's experts explaining the data which shows conclusively that Stack Island washed away completely in at least three different time periods:

1) Prior to the sovereignty of either state in 1812 and 1817;
2) In 1883;
3) In 1948.

The bed of the Mississippi River was scoured clean of this feature in each of these years.

C.

The Special Master erred in refusing to acknowledge the applicability of federal law and standards defining islands, for example, the following:

1) An island is "a body of land extending above and completely surrounded by water at mean high-water." U.S. Coast and Geodetic Survey; (LA-PT-2)
2) An island must be "above the mean high-water elevation of any meanderable body of water, * * *." Department of the Interior; and (Mayeux, Sup. Tr.; 43 U.S.C. 1301)
3) An island must be higher than "top bank" elevation of the river or ordinary high water. Industry definition used by river engineers at the U.S. Army Corps of Engineers and throughout the world. (Winkley, Sup. Tr.)

The Special Master erred by inconsistently applying subjective and arbitrary notions concerning the definitional criteria for islands, confusing them with bars and shoals, so as to force pre-determined conclusions concerning Stack Island, Providence Bar, the disputed area and accretionary landforms south of the disputed area.

D.

The Special Master erred in simply adopting by reference the "Austin Smith Line" (Appendix "A" to the report) which is unsupported by any technical evidence or data, and contrary to all controlling technical evidence, data and testimony from the experts, including the admissions of Mississippi's Austin Smith.

E.

The Special Master erred in misconstruing and misapplying applicable rules of law.

V.

ARGUMENT

A. STATEMENT OF THE CASE

The defendants in this case, the State of Mississippi and the Houston Group, continue to claim accretion along the west bank of the river at Lake Providence, Louisiana, including batture lands which have been used historically for farming by Louisiana riparians who have proven clear title and the payment of taxes on these lands since the time of Louisiana's sovereignty (1812). In fact, as shown at the original trial in the District Court and at the Supplemental Hearing, the "Austin Smith Line" transects Louisiana farmland on the river side of the Louisiana levee which was never washed away or re-built by the river. Robert Jarvis, a member of the Houston family and only one of three witnesses for the Mississippi interests at the Supplemental Hearing, does not dispute this, but feels that since he has hunted in the general vicinity from time to time and has walked across some of these properties, he has a good claim of ownership (4 Sup. Tr. 210 et seq.). The Louisiana owners, of course, disputed these claims at both hearings.

This case involves the boundary between the States of Mississippi and Louisiana in the vicinity of an island located in the

Mississippi River known as "Stack Island" or "Island No. 94." However, the only true island in existence in the near vicinity of the dispute is an extremely large island which has developed at the geographic location of original Island No. 94 in 1881. This island is clearly shown on various Louisiana exhibits, such as LA-1A, a U.S. Geological Survey Quadrangle Map. Also shown on the map is the 1881 location of the island patented to petitioners in 1888, being only 117.96 acres in size at the time. Later, it washed away entirely as shown by the ample testimony, documentary evidence and holding of the trial court in this case. That court, of course, also held that the island had migrated across the river, but did not discuss the "new" island in the river at the location of Island No. 94 in 1881.

It is noteworthy that after its disappearance in 1883, no later map again referred to "Island No. 94." After the reappearance of a new island the next year, it lost the No. 94 designation and became simply "Stack Island."

Mississippi and the Houston Group do not like to address the principal object of their claim - the accretion along the west bank of the river at Lake Providence, Louisiana. They are quite careful to avoid detailed factual matters and confine the argument largely to broad-brush legal principles found in the case law, without applying them to the specific facts of this case.

The accretionary features are a part of the west bank of the Mississippi River at Lake Providence, Louisiana (P- 1, P-2, LA-1, LA- 1A) and are entirely different formations from the Island No. 94 location. They are located in a different geographic vicinity; they have different histories of origin; they are different in size and shape; and at all times since their formation in the 1930's, have been west of the boundary between the States of Louisiana and Mississippi. They are connected to and are a part of the Louisiana bank and have no island features whatever, except at extreme high water. The designation of these accretions as "Stack Island" on some maps is due to the work of

draftsmen seeking to give the area a name.

While the Houston Group is asserting ownership to this bank accretion on the Louisiana side, they have carefully avoided any discussion of it from the very outset of the case, except to call it "Stack Island." There are actually two separate geographic locations at issue, to wit:

(1) The accretion to the west bank of the river at Lake Providence has sometimes been referred to as "the island" or "Stack Island," as it appears to be an island at extreme high water; and

(2) The "new" island which has developed at the precise geographic location of original Island No. 94 and is known and mapped as "Stack Island."

The trial court also avoided discussing the fact that there are two separate geographic locations at issue by not specifically referring to them. The Special Master did refer to the "new" island, but did not mention that it is in the precise location of Island No. 94, northeast of the disputed area and adjacent to Mississippi.

Under cross-examination in the District Court trial, Mississippi's expert, Austin Smith, drew a sketch on P-2 of the accretion against the west bank of the river (Tr. 409-410), and on P-1 drew the original Stack Island as of 1881 (Tr. 412). His testimony shows that prior to the avulsion of 1881, the island was located geographically in T 11 N, R 9 W of the Choctaw Land District, Mississippi, while the accretion against Lake Providence on the west bank of the river is located in T 21 N, R 13 E of the Red River Land District, Louisiana (Tr. 412). Further, Austin Smith admitted that the original Island No. 94 and "Stack Island" which has accreted to the west bank, as claimed by petitioners are not "one in the same," as he had earlier testified. (Tr. 461-463.)

The District Court referred to the "migrating Stack Island"

in the bench opinion of June 23, 1989, page 16. That court correctly found, as Louisiana contends, that the island "was eroding and accreting and migrating generally in a southwesterly direction, by 1954 had moved out from under any portion of the superimposed original island and therefore had disappeared * * *." In the Supplemental Hearing, it was shown that Island No. 94 had been completely scoured or washed away completely in 1811, 1883 and 1948, re-building in the interim periods and in 1954 at the 1881 location, as it is today.

The State of Louisiana contends, as set forth in paragraph 7(d) of the Pre-Trial Order filed in No. 91-1158 (Tr. 664-665), that Island No. Ninety-four (94) in the Mississippi River patented by the United States on December 29, 1888 to Stephen B. Blackwell, located in Township 11 North, Range 9 West of Choctaw Meridian in Mississippi, containing 117.96 acres was eroded away by the natural processes of the Mississippi River, subsequently re-formed as "Stack Island" and currently exists at its location at the time of the federal patent. It is not, however, to be confused with accretion to the west bank, which occurred commencing in the 1930's, at the same time Stack was rebuilding in the 1881 location, only to be washed away again in 1948.

Mississippi's expert, Austin Smith, drew a boundary generally along the Louisiana levee on the west bank in order to capture ownership of both the accretion to the west bank, as well as the new and extremely large island located in the river proper at the 1881 location of the island. The accretion to the west bank has been assimilated into the land mass along the west bank, and was so found even by the district court. In its Bench Opinion of June 23, 1989, the court found that this accretion to the "Louisiana shore" is "for large portions of the year completely dry between what is called the island and what is called the high bank on the Louisiana side," making it a part of the bank.

Mississippi and the Houston Group are claiming possession, jurisdiction, and sovereignty of both the land accreted to Louisiana and to the "new" Stack Island near Mississippi. Hence, the Fifth Circuit characterization of the boundary dispute as "treacherous."

In the district court and the Fifth Circuit, defendants have claimed that two avulsions occurred in the Mississippi River in the vicinity of Lake Providence, but failed at both trials to present testimony or evidence of either. The Lake Providence Reach of the river is straight in its alignment, making an avulsion extremely unlikely without the intervention of man-made works, such as the 1881-1882 Mississippi River Commission dike project which Louisiana clearly established from U.S. Government documents.[2]

The Special Master failed to recognized that since Mississippi and the Houston Group could not show a thalweg boundary against the Louisiana levee, actually claimed by them to be located on fast land, and could not produce any map or data showing how it might have been frozen there, they simply have no claim.

B. THE APPLICABLE LAW OF THALWEG BOUNDARIES

During closing argument and briefing following the Supplemental Hearing, the Special Master asked the parties to assume for purposes or argument that he would follow the District Court and rule in favor of the Mississippi parties to the extent of holding that the northern portion of the disputed area is traceable uninterruptedly to the Stack Island of 1881, transformed in location and area by the forces of accretion and erosion.

In response to the Special Master's inquiry concerning this

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[2] See Statement of the Case from Brief In Opposition By The State of Louisiana and The Lake Providence Port Commission and Brief for Respondents in No. 91-1158, setting forth these same facts.

view of the findings of Judge Barbour,[3] it is to be noted that the lower court took the view that any accretionary feature labeled on a map as "Stack Island" was in fact and in law an island, regardless of its characteristics, elevation or location. The Special Master accepted this view and implicitly rejected applicable principles of law pertaining to features such as banks, bars, shoals, and islands, as well as the correct meaning of "avulsion" and "boundary thalweg."

Proper adherence to applicable technical definitions and rules of law is essential to a correct decision in a case of this type. Both the District Court and the Special Master viewed sand waves, bars and shoals in the bed of the river as islands, even though they did not protrude above low water, were ephemeral, transitory, constantly changing and evolving and moving with the massive current of the river. To treat sand waves, bars and shoals as a true island distorts the factual evidence presented and causes a misapplication of the rules of law. In this regard, the Special Master has correctly recited the legal principles defined by this Court in four of the prior cases between the two states, as recited at pages 11 and 12 of the Final Report, those being *Louisiana v. Mississippi*, 466 U.S. 96 (1984); 384 U.S. 24 (1966), *reh'g denied*, 384 U.S. 958; 282 U.S. 458 (1931); and 202 U.S. 1 (1906).

At page 12 of the Final Report, the Special Master also further states the Island Exception to the rule of thalweg, citing *Indiana v. Kentucky*, 136 U.S. 479, 508-09 (1890), and *Missouri v. Kentucky*, 78 U.S. 395, 401 (1870). Thereafter, quite mistakenly, the Special Master applies the rules from *Arkansas v. Tennessee*, 397 U.S. 88, 90 (1970), and *Arkansas v. Tennessee*, 246 U.S. 158, 175 (1918) to the facts of this case. Those two cases, however, arise out of factual circumstances dramatically different from those of the case now before the Court.

[3] See letter of Special Master of October 5, 1994, and 5 Sup. Tr. 210-220, wherein the Special Master begins to follow the District Court view that Stack Island had continuous existence and accretes to the west, "pushing" the secondary channel/frozen channel/boundary thalweg (?) toward Louisiana and against the Louisiana shore. Actually, the live thalweg and downstream track of navigation was against the Mississippi bank for *all* relevant periods of time, particularly those years 1949–1954, chosen by Austin Smith to be the time of avulsion which purportedly froze the boundary along the Louisiana bank. This was clearly shown by the Winkley hydrographic exhibits, being Corps maps for all periods.

Each of the cited cases dealt with classic avulsions. In the 1970 case, an avulsion occurred leaving Tennessee lands on the Arkansas side of a **new channel**, while water in the former thalweg became stagnant so that the processes of erosion and accretion no longer occurred. In this situation, the boundary between the states became fixed in the middle of the old abandoned channel, while the active river left this former channel, formed a new bed, new banks and moved to a new location.

The same thing occurred in the 1918 case, in which roughly similar events occurred. None of these events occurred in the case now before the Court in the Lake Providence reach of the river.

It is submitted that the Special Master clearly exceeded the holding in these cases by suggesting that a frozen boundary continues to be ambulatory in nature (Final Report p. 12) and that such a principle applies to this case. In the Lake Providence reach of the Mississippi River, the bed has been continuously covered with flowing water from east bank to west bank throughout all of recorded history. All known maps, photographs and hydrographic data show the thalweg meandering back and forth within its bed, but entirely within the banks of the river, ergo, the river has not abandoned a former bed, cut a new channel or established new banks, nor has a former channel ever attenuated and gradually ceased to flow, as in the cases cited by the Special Master. Therefore, there can be no frozen boundary, nor an "ambulatory frozen boundary" to be

"pushed" toward Louisiana. There is no evidence whatever to show such an occurrence in this case. While Mississippi witness Austin Smith claimed two avulsions occurred, he admitted that the river never cut through its banks and never made a new bed (5 Sup. Tr. 93–100), basing his claim on "enlargement" which never occurred.

The Louisiana experts (Easterly, Mayeux and Winkley) carefully explained the condition of the River through the presentation of exhibits for all pertinent periods of time. Mississippi and the Houston Group did not attempt this in any fashion.

C. TREATMENT OF EXPERT TESTIMONY

Questions concerning the location of the boundary between the States of Louisiana and Mississippi in the Lake Providence Reach of the Mississippi River, require a proper understanding of (l) the terminology of fluvial or riverine boundary determinations, especially the definitions and distinctions emerging from the various decisions of the U. S. Supreme Court and treaties to which the United States is a party, (2) the relevant alluvial forms and fluvial processes, i.e., geomorphology and hydrology, and (3) the evidence provided by historic cartography and related archival materials, including government reports or documents. The State of Louisiana embraced these matters in the context of its evidence and expert testimony. Unfortunately, the intricate, detailed, and sometimes subtle scientific and technical presentation proved overwhelming to an otherwise observant Special Master.

Judge McKusick's failure to grasp the terminology and essentials of river processes in the Lake Providence Reach necessarily produces his clearly erroneous conclusions on several critical points of determination. Mr. Winkley, an experienced hydrologist, devoted so much time at the trial, and Dr. Easterly, an alluvial geomorphologist, discussed in prepared testimony,

the dynamics of the Mississippi River and the nature of recurrent accretionary features. The Special Master, however, either did not comprehend that extensive testimony and considerable evidence, or simply chose to disregard it.

What Judge McKusick has done is to substitute his own views and lay opinion for that of the experts, whose education, professional credentials, experience, reputation and integrity were unchallenged. For instance, Winkley (LA-PT-1), Chief Hydrologist and Potamologist for the Corps of Engineers (river engineering, geology, river hydrology, and potamology, 2 Sup. Tr. 122); Easterly (LA-PT-2), (political geography, boundaries, alluvial geomorphology, 3 Sup. Tr. 289); Mayeux (LA-PT-4), Registered Professional Land Surveyor, Mississippi, Arkansas, Texas, and Louisiana (expertise in boundary location, title abstracts, possessory acts and hydrographic surveys, 4 Sup. Tr. 5 et seq.)

The experience and reputation of these witnesses is such that they were accepted as experts in their fields without question (Winkley at 2 Sup. Tr. 123); (Easterly at 3 Sup. Tr. 289); except as to Mayeux's prepared testimony which was questioned but unrefuted (4 Sup. Tr. 8-85).

It is therefore submitted that Judge McKusick's view of the evidence, being a mere substitution of his lay opinion for that of the experts, is an impermissible view.

It might prove helpful, however, to note the words of a Special Master who did appreciate the dynamics of the Mississippi River in his report (at page 2) for *Tennessee v. Arkansas, No. 77 Original*:

> Maps do not do justice to the true scale of the river. The larger island areas are miles long. The river is extremely wide. During high water or floods the river can erase or build a very large land mass in a matter of days. The river's water level is very changeable. At low water many bars may protrude from the river's bed, islands

may seem to increase greatly in size because of exposed adjoining sand and mud flats, and chutes where water other times may flow are completely dry and passable by foot. At higher water stages the bars are no longer visible, only the more elevated portions of islands remain above the water surface and water flows in the chutes, dividing what formerly seemed to be a single piece of land. At flood stages, the river may completely submerge all land masses within its banks.

What the Special Master, Judge Earl R. Larson, found to be the reality of Plum Point Reach proves equally true of Lake Providence Reach. The sheer size of the river, with a width of more than a mile, the enormous volume of flow and the daily changes which occur must be seen and studied to be appreciated (See prepared testimony of Winkley and Vols. 2, 3 and 5, Sup. Tr.)

Accretionary features, in the forms of shoals, sand bars, and islands, continually form, evolve, disappear, and reform in "recurrent approximate relational positions." In that way, an accretionary feature (sometimes described as "Providence Bar") appears along the west bank (Louisiana) of the lower Lake Providence Reach in 1770, 1821, 1836, 1849, 1856, 1861, 1874, 1884, 1907, 1930, 1933, 1950, and 1952 (by which time that island mass has combined with other accretion comprising the "Disputed Area").

Throughout the same time period, Island No. 94 or Stack Island, similarly, disappears in 1811, reforms as a mere "bar with a few willows" by 1817, remains "only a dry sand bar" by 1825, forms as an island above ordinary high water by 1881 (see Prep. Test. of Dr. Easterly, LA-PT-2), disappears by 1883 (see Mayeux and Winkley, Sup. Tr.) and reforms as a moving mass of alluvion which eventually appears to locate as a bar (because it only appears above low water) near the vicinity of the sometimes "Providence Bar" and in the place of eroded Louisiana riparian land.

In the District Court, Judge Barbour unfortunately failed to appreciate the evolving character of the accretionary features existing in the Lake Providence Reach. The Special Master in the instant case adopts the District Court's error. In the former's "Bench Opinion," for example, Judge Barbour characterizes Lake Providence Bar as a bar merely because it is so named on a map (apparently unaware of the hazards of relying too greatly on generic place-names). More significantly, however, he considered Stack Island to be an island because it appeared above low water (a proper definition for a bar, but not for a true island!). Such characterizations reflect a failure to understand the changing and recurring character of actual accretionary features and a misplaced reliance on generic place names. (In Judge Barbour's defense, however, he did not have the benefit of Mr. Winkley's extensive three-dimensional study of the Lake Providence Reach, together with the information as to both depths and elevations of various accretionary features, whether generically termed "bars" or "islands."). Judge McKusick compounds this erroneous confusion of terms.

An island, of course, is properly defined as "a body of land extending above and completely surrounded by water at mean high water." (See for example, Prep. Test. of Dr. Easterly (LA-PT-2, p. 16) and the Trial Testimony of Mr. Mayeux). Anything less than dry at mean or ordinary high water, constitutes a bar or something other than a true island, no matter its former character.[4] A moving mass of accretion, for instance, does not an island make! (even if it appears to extend from a former island location).

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[4] A significant problem that occurs in the evaluation of maps is the need to know the surface water elevation of the map. At low water and middling stages, all features showing above water would seem to be islands when they may actually be bars or shoals and would be submerged at higher stages.

All recognized definitions of "island" contemplate "a body of land extending above and completely surrounded by water at mean high water." This is the definition adopted by the U.S. Coast and Geodetic Survey, by the Department of the Interior, Bureau of Land Management (LA-SE-122) and by the United States Code, 43 U.S.C. 1301, defining lands beneath ordinary high water as constituting the bed and bottom of navigable waters. This was also briefed at page 15 of the Trial Brief Of The State of Louisiana. Thus, only the portion of a feature above high water is an island (see No. 77 Original, Judge Earl R. Larson, p. 15 supra).

The definition of "island" is routinely followed by the United States in both domestic and international law and practice, and customary international law. This definition, as derived from international law, is applied by the United States government in delimiting its jurisdiction with the states in coastal areas, as well as inland. (See for example, U.N. Convention On The Territorial Sea and Contiguous Zone, Article X, which defines an island as a naturally formed area of land, surrounded by water, which is above water at high tide. The United States is a party to this convention and has applied this definition in the several Tidelands cases.)

The Supreme Court of the United States has adopted, confirmed and applied federal definitions, such as that of the U.S. Coast and Geodetic Survey, in decisions involving matters of this type, as in *Borax Consolidated v. city of Los Angeles*, 296 U.S. 10, 56 .Ct. 23, at 29 (1935).

The Supreme Court of the United States, in deciding *Texas v. Louisiana*, 410 U.S. 714, 93 S.Ct. 1215 (1973), at page 1221, discussed island criteria, and cited the earlier case of *Scott v. Lattig*, 227 U.S. 229, 33 S.Ct. 242 (1913), with favor as concerns the proper definitions to be applied to features such as islands. In *Lattig*, the Supreme Court held that an island has "well defined banks extending from 3 to 5 feet above high water" citing cases

in the coastal areas which applied definitions similar to those employed by federal agencies such as the U.S. Coast and Geodetic Survey. The *Lattig* case arose out of a dispute in an inland navigable river, the Snake River in Idaho, similar to the matter now before the court.

In *Burford v. Sun Oil Co.*, 319 US 315, 63 S Ct 1098 (1943) this Court, at least in dicta, recognized that "geologic realities" of a highly technical nature must be granted some deference. Also, the Court refers to "geological-legal problems of novel nature."

Mr. Winkley, Chief Hydrologist and Potamologist for the U.S. Army Corps of Engineers (Retired) and a resident of Vicksburg, a Louisiana witness of national and international stature, followed the practice of river engineers in defining an island in terms of "top bank," a substitute and technical equivalent of "mean high water." (2 Sup. Tr. 189, 264, 266). (See also, LA-SE-122, Manual of Instructions for the Survey of the Public Lands of the United States, 1973, page 22, "Every island above the mean high water elevation of any meanderable body of water, except islands formed in navigable bodies of water after the date of admission of a State into the Union, * * *.") Perhaps, Judge McKusick could have avoided running aground of the Wachusetts Bar, a site of steamboat wrecks prior to 1883, if he had properly considered *City of St. Louis v Rutz*, 138 U.S. 226 11 Sup. Ct. 337, at 346 (1891).

A comparison of the facts of *City of St. Louis v. Rutz* with those of the Lake Providence Reach proves most instructive. In the former case, the dispute focused on the ownership of an island considered by some to have relocated from near the bank of Missouri down the river to a new location in the area of eroded former riparian land of Illinois. That island, first known as "Quarantine Island" (because of its use as such by the city of St. Louis), was surveyed in 1853. Ten years later, in 1863, the island, then known as "Arsenal Island" (because of

the presence of a U. S. Arsenal), was again surveyed. It was then designated as "St. Louis School Lands" containing in excess of 109 acres. By contrast, Island No. 94 disappeared in the New Madrid Earthquake of 1811. It reappeared as a mere bar, not a true island, and remained such until shortly before its first survey in 1881. Stack Island's short tenure as an island proves insignificant compared with the more stable landmass of Quarantine or Arsenal Island.

Arsenal Island, subsequent to 1863, began to erode at its upper end and accrete below, thereby appearing to "migrate" southward to the Illinois side of the Mississippi River. However, during that time, Arsenal Island became "a mere moving mass of alluvial deposits." In the words of the Court, "to such a movable island, traveling for more than a mile, and from one state to another, the law of title by accretion can have no application."

In the somewhat related case of *Carrick v. Lamar*, 116 U.S. 423 (1886), the Court noted that, by 1883, the former Arsenal Island could not be surveyed again, because of its "drifting character" and lack of "stability and permanence." Indeed, at that time, an individual settled and farmed the island of 230 acres. Nevertheless, the Court observed that "even during the time of a survey what would be a monument and a boundary today might require change tomorrow, and that, therefore, as long as the same causes continued to operate and make the island a mere moving mass of alluvial deposits, it was useless to establish corners and monuments, which would be subject to immediate obliteration."

Judge McKusick rejects the view pronounced by this Court at page 24 of the Final Report.

Much less could be said for the character of Island No. 94 after 1881–1882. By 1882, an alluvial tail, being merely an attached bar, extends downstream from the former Wachusetts Bar.

Note from the exhibits that the alluvial bar-tail is attached

to Wachusetts Bar, not the 117.96 acres surveyed as Island No. 94. This was also misconstrued by Judge McKusick, who believed that anything shown on the map was an island and, this being so, was a part of Stack Island. Thus, Wachusetts Bar, attached to Island No. 94, and the alluvial bar-tail attached to Wachusetts Bar are seen by Judge McKusick as "one big island," when only the 117.96 acres of it is above high water. This is critical to his belief that there was continuous existence — as the part actually surveyed (117.96 acres) was scoured away, the low elevation tail migrated south and lived on as an island in the mind of Judge McKusick. Parenthetically, even the tail washed away, as Austin Smith admitted.

Within the following year, 1883, both island and accretions are washed away, replaced by the newly scoured steamboat channel, as established by the Mississippi River Commission (See LA-SE-159).[5] A subsequent, moving mass of alluvial deposits formed, (just as it had after the New Madrid Earthquake of 1811 and just as it did in the formation of the more recent "Stack Island II" or "Rabbit Island," also known locally as "Louisiana Bar"). In an odyssey across the Mississippi River, Stack Island dissipated into an agglomeration of shoals and bars, not unlike Providence Bar beyond. However, during that time, it could by no means be classified as an island. It lacked elevation, permanence and stability. It could not be surveyed nor monumented. Eventually, some bar accretions accumulated on the Louisiana side of the river, combining with rem-

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[5] At page 19 of the Final Report, Judge McKusick seeks to explain away LA-SE-159, an original 1881 Mississippi River Commission map made by Captain Marshall, base map 1881, with hydrography added in 1883. Mississippi witness Austin Smith admits that the map is authentic, 5 Sup. Tr. 150-160, and that the steamboat channel (main navigation channel) is authentic, 5 Sup. Tr. 156. Neither is able to comprehend or admit the meaning of the legend information inscribed on the map explaining the use of map symbols or the difference between the 1881 base map and the 1883 hydrographic data

nants and reformations of accretions sometimes identified as "Lake Providence Bar" or Louisiana "Island No. 7." By the late 1960's, a new island named "Stack Island" had reformed at the original 1881 location and it is there today.

In *City of St. Louis v. Rutz*, supra at 346, the Court carefully excluded any effects for the "Island Rule," to wit:

> . . . We must not be understood as implying that if an island in the Mississippi river remains stable in position, while the main channel of the river changes from one side of the island to the other, the title to the island would change because it might be at one time on one side and at another time on the other side of the boundary between two states. The right of accretion to an island in the river cannot be so extended lengthwise of the river as to exclude riparian proprietors above or below such island from access to the river. (Emphasis added)

The same could be said for Stack Island and Lake Providence Reach. There, not only did the island not "remain stable in position," it entirely washed away by 1883. Even if it had not washed away by 1883, after that time, Stack Island was never again an island with elevations above the ordinary high water mark. It was, indeed, merely a "moving mass of alluvial

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added after river survey two years later, showing the sailing channel to be 1,500 feet wide and passing directly over the former location of the island. Compare with testimony of Michael P. Mayeux, 4 Sup. Tr. 138 et seq. in which he discovers that Mississippi listed the same map in the original trial, but did not use the updated 1883 version showing the island had been washed away and that the main channel of the river now passes over it. See also, 24 feet of water covering the surveyed location at low water, 59 feet at high water, 4 Sup. Tr. 182–186. Compare with testimony of Brien R. Winkley explaining the meaning of the 1883 hydrographic data in detail, 5 Sup. Tr. 6-42, and the preparation in Court of LA-SE-159-A, a cross-section showing the depth of the river at the former location of the island, 5 Sup. Tr. 42. "The map is authentic," 5 Sup. Tr. 49.

deposits"!

Nor does *Arkansas v. Tennessee*, 397 U.S. 88 (1970), provide help to the problem of Lake Providence Reach. The premise that an old channel might continue to wander as long as it carries some water flow, applies to a case where the main channel moves because of a true avulsion. Such simply did not happen in the Lake Providence reach. The chute channels along the Louisiana bank were never the main channel. And the more recent case of *Tennessee v. Arkansas*, No. 77 Original, (referenced above) proves of limited value (although at first glance, deceptively similar to the present case) because the "migrating" islands in that case were not washed away and always reappeared after the floods in essentially the same position. Rather, the river shifted around islands as they extended their accretions.

To summarize, therefore, Island No. 94 disappeared in 1811 and did not again become a true island worthy of survey until about 1881. Shortly thereafter, it again disappeared as an island, became a moving mass of low elevation alluvial deposits, which gave the illusion of appearing to eventually occupy locations containing recurrent accretionary forms always claimed by the State of Louisiana and its assigns, namely, Providence Bar on the Louisiana bank. Those alluvial deposits came from upstream, not Stack Island, and combined with remnants of Providence Bar and the Louisiana bank. They only show on "maps, mosaics and aerial photographs" at times of low water and are otherwise submerged (See Final Report, p. 17). This is why the deposits are called accretion to the bank and not islands.

Remarkably, Judge McKusick employs an unusually subjective classification to accretionary features, defining "islands" in terms of their "degree of permanence" (Final Report, p. 23). If one aspect of "Stack Island's" history proves evident, that is its total lack of permanence. (Indeed, how can

a "migrating" mass of constantly changing size and shape be considered "permanent"?) Even so, while rejecting legal, scientific and technical definitions of "islands" and employing a definition broad enough to include various low-water landforms, such as "bars," the Special Master relies on Judge Barbour's determination that similar accretionary features which exist below the Disputed Area should not be considered "islands" but "bars" so as to render them accretions which could subsequently "attach" to Stack "Island" (Final Report, pp. 26-27, footnote 12). Such patent inconsistency defies all reason and common sense! Any attempt to subsume the latter features under Mr. Smith's dubious and contradicted notions of "confluence accretions," presented only in the district court, (cf. Joint Appendix, vol. II, pp. 165-166) does not alleviate the highly subjective and arbitrary use of these terms.

To call a moving mass of accretion from 1883 to fairly recent times an "island" and then classify "Providence Bar" and other locational features as something other than islands shows rank disregard for the use of proper definitional criteria. This proves both logically inconsistent and disregards the realities as understood (and testified) by the several disciplines represented by the experts, i.e., geography & geomorphology, hydrology, and surveying. At professional meetings of the latter, such ignorance and disregard of the scientific and technical aspects of this case would surely be displayed as an object of ridicule and criticism. Even so, the ever-changing definitions of "bars" and "islands" by the Special Master (but not, interestingly, the Fifth Circuit [See *Houston v. Thomas*, 937 F.2d 247 (5th Cir. 1991), footnote 2.)] in an obvious procrustean effort to force a pre-determined legal result is without excuse.

It is notable that the river had been swept clear of even bars or shoals by 1948, as shown by the Corps hydrographic survey

(LA-SE-20).[6] There is nothing left in the bed of the river but sand waves and bed forms. Mississippi and the Houston Group did not contest this evidence, nor did Austin Smith, but attempted to seize upon a long low bar just beginning to develop in 1949 as "Stack Island."

It should be obvious that since a bar is not an island, the "Island Rule" cannot apply. Thus, a developing bar cannot "push" a minor chute or a purportedly frozen thalweg. Parenthetically, since there was no island in 1948 and the thalweg was against the Mississippi bank at this time, as shown by the Corps hydrographic surveys, there can be no frozen thalweg to be "pushed" toward Louisiana as the bar feature, Providence Bar, reforms.

The burden has been on Mississippi and the Houston Group to show both a (1) true island and (2) continued existence as such through time. Snap-shot photo overlays from different years of bar features seemingly connected or overlying one another do not satisfy either requirement. Basically, the overlays show only a bar in one year, while in existence at that time, overlying a nearby location at a moment in time in yet

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[6] At page 21 of the Final Report, Judge McKusick blatantly dismisses a series of 1948 Corps of Engineers hydrographic surveys (LA-SE-20A, B, C and D) which show at least 25-30 feet of water covering the highest point in the river at that time, ergo, no islands are in existence. The stated basis for rejection of this hard evidence is that no "local observers" reported such, but to whom? The Master also confuses the testimony of Mississippi witness Burkhardt concerning the age of trees shown in the field notes from the 1881 survey of Island No. 94, an area some 6 miles distant from the disputed area and 67 years earlier in time (1948–1881 = 67). The Master also suggests that elevations five feet higher than ordinary high which re-built after high water in the following year, 1949, give credence to the continued existence of an island. This high point, however, was the single highest point in the river in 1949, being a tiny area of high elevation on top of a bar. If the reading is based on the Vicksburg gauge and not the Lake Providence gauge, even the single high point is under water.

another year. This technique proves nothing in terms of elevations to meet the island requirement, or continual existence.

Mr. Winkley clearly testified that there were no islands in the Lake Providence Reach as of 1883 or 1948 (3 Sup. Tr. 264–266), as did surveyor Mike Mayeux (4 Sup. Tr. 141–145). Thus, whatever formed later west of the active main navigation channel belongs to Louisiana. This testimony and evidence is unrefuted in the record of the case, except possibly by the Special Master, and it is an impermissible view on his part. Mississippi certainly had no witness willing to challenge the Corps data, nor Winkley, nor Mayeux, in their explanation of the specific details of voluminous maps and hydrographic surveys. While the Mississippi lawyers cross-examined, no Mississippi witnesses were called, except Austin Smith. He was never asked by his lawyers to evaluate and discuss this hard data.

All of the evidence in the record shows that after 1882, all of the features in the Lake Providence Reach of the river were bars and not true islands. Even now, the disputed area against the west bank of the river at Lake Providence is below ordinary high water or mean high water or "top bank," as the Special Master was personally shown during the site visit by boat on May 5, 1994. That is, the entire disputed area was covered by at least thirty (30') feet of water at ordinary high on the day of the visit, well below flood stage, for a significant period of time, although the tops of very tall trees were emerging above water level.

Thus, a clear contrast is made between a feature such as the new Stack Island up river in its usual location near the Mississippi bank and the disputed area, which is nothing more than growing bank accretion even though there are minor channels through it which show in several places at low water caused by river action at both high and low water. See No. 77 Original, supra, and the comments of the Special Master, Judge Earl R.

Larson.

Both the Louisiana riparians and the State of Louisiana have exercised jurisdiction and possession of the disputed area. Neither Mississippi nor the Houston Group offered any evidence to show adverse possession, other than deer hunting activity by Robert Jarvis, as well as many other persons, including Louisianans. It must be remembered that Mississippi and the Houston Group called no witnesses in the Supplemental Hearing except Austin Smith and Robert Jarvis. In marked contrast, Louisiana produced numerous witnesses to show the clear exercise of use, occupancy, possession and official acts of sovereignty through the exercise of law enforcement activities, continued and uninterrupted. Mississippi showed none and called no one in an attempt to do so. The abundant lack of evidence concerning the claims of Mississippi and the Houston Group to adverse possession, acquiescence and title was startling: the only claimed use of the disputed area was hunting during deer season; there were no witnesses from any Mississippi agency or anyone else claiming sovereign acquiescence, and no title or tax documents pertaining to the Louisiana Land District (T21N, R13E of the Red River Land District) except those of Louisiana riparians. The disparity in amount and quality of relevant and probative witnesses and evidence put on by Louisiana, as contrasted to Mississippi, is overwhelming.

Louisiana's evidence, while lengthy, is clear, concise, directly on point, and based almost entirely on official government maps, reports and hydrographic surveys. It is, essentially, unchallenged and irrefutable. On the other hand, Mississippi's evidence consisted largely, particularly in the Supplemental Hearing, of photocopies of maps and current (1994) photography used in cross-examination of the Louisiana witnesses in an effort to show that from a one dimensional plan view (bird's-eye view) there was an island in the river. This type of approach will not show elevations, which is critical to determin-

ing character as a true island. Mississippi witness Austin Smith had no new or even supportive data to back up his opinions, and he said, generally, that he could not really remember what data he might have used in the District Court trial. This was Mississippi's only technical witness.

CONCLUSION

The Court is urged to carefully review and apply the facts in evidence in this case as developed by the Louisiana experts, Hatley Harrison, Ernest Easterly, Brien Winkley and Michael Mayeux, based on qualitative scientific analysis, historical research, calculations and data. The totally unsupported *ex cathedra* opinion of Austin Smith and argument of opposing counsel carry little weight by comparison.

Similarly, the extrapolation and adoption by both Judge Barbour and the Special Master of Austin Smith's dubious confluence bar theory, actually barely discussed in his original trial testimony, and placement of a frozen thalweg unsupported by any objective evidence near Smith's points 1 to 22, should be rejected. There is simply no evidentiary foundation.

The case should be decided on the proven facts supported by documentary evidence, based on applicable rules of law and definition, and without resort to ad hominem urging. If the Court finds that the thalweg was not frozen in the east chute channel (as maintained by Louisiana in the District Court and held by the U.S. Fifth Circuit in *Houston v. Thomas*), then the law, facts, evidence and even common sense dictate that the present live thalweg should be the boundary between the states. There is certainly no evidence that the interstate boundary should follow along Louisiana's levees and through the fields of its citizens.

It is submitted that there is no evidence to support Austin Smith's contentions and interpretations, and the findings of the Special Master are erroneous. It is the established jurisprudence under Rule 52(a) of the Federal Rules of Civil Procedure that a finding is "clearly erroneous," as here, when the reviewing court on the entire record and evidence before it is left with a definite and firm conviction that error has been committed. See *United States v. United States Gypsum Company*, 333 U.S. 364 at 395, 92 L.Ed. 746, 68 S.Ct. 525 at 542 (1948); *W.S. Shamban & Company v. Commerce and Industry Insurance Company*, 475 F.2d 34 (1973).

Louisiana prays that this Court will reverse the findings of the Special Master and enter its Decree here determining the locus of the Louisiana Mississippi boundary at issue to be described according to the geodetic coordinates prepared by Hatley Harrison and included in the Final Report as Appendix B. Alternatively, that the boundary be decreed to be the present live thalweg of the Mississippi River.

Respectfully submitted,

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Supreme Court of the United States

October Term, 1994

THE STATE OF LOUISIANA

v.

THE STATE OF MISSISSIPPI, ET AL.

JOINT RESPONSE OF MISSISSIPPI AND THE HOUSTON GROUP TO THE EXCEPTIONS OF THE STATE OF LOUISIANA

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RECORD AND PARTIES REFERENCES

The Exceptions of the State of Louisiana to the Final Report of the Special Master and Petition for New Trial of the Supplemental Hearing is referred to herein as "Exceptions" or "Louisiana's Exceptions."

The transcript of the district court proceedings before Judge Barbour is cited herein as "Tr. [page number]."

The transcript of the supplemental proceedings before the Special Master is cited herein by witness, volume, and page number. *E.g.* "[witness name], [volume number] Sup. Tr. [page number]."

Defendants/Respondents Julia Donelson Houston Erhardt, Ruth Houston Baker and Hines H. Baker, Jr., Co-Executors and Co-Trustees of the Estate of George T. Houston a/k/a George T. Houston III, deceased, and Ruth Houston Baker, individually, are collectively referred to herein as the "Houston Group."

Defendants/Respondents Mississippi and the Houston Group are collectively referred to herein as "Respondents."

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Louisiana's Exceptions make reference to collateral matters that have little to do with the controlling issues in this litigation. To bring matters into focus, it may be helpful to indicate what the parties' dispute is ***not*** about. It is not about any "new island" in the Mississippi River; that island has never been the subject of these proceedings. Furthermore, the dispute is not really about the location of the "live" thalweg – the present downstream navigation channel; the "live" thalweg is not the issue. Instead, this litigation is about the ***boundary thalweg*** and its location relative to Stack Island, referred to in these proceedings as the "Disputed Area."[1]

There is little disagreement between the parties regarding the law – the Rule of the Thalweg, the Island Rule, etc.[2] Similarly, there is no disagreement regarding the location of the boundary thalweg relative to Stack Island at the time it was patented to the Houston Group's predecessor in title. Instead, the parties' disagreement centers on whether the Disputed Area is the result of the accretionary migration of Stack Island from its location at

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[1] The Special Master coined the term "Disputed Area" for the area in question in an effort to bring uniformity of nomenclature. In this Response, Respondents use the terms "Stack Island" and "Island No. 94" to refer to the island during the time it was changing in configuration and location. The term "Disputed Area" is used to refer to Stack Island in its current location.

[2] The sole exception in this regard appears to be the newly-devised "top bank/mean high water/ordinary high water" definition that Louisiana seeks to overlay onto the Island Rule.

the time of the federal patent to its current location along the Louisiana bank.[3]

The Special Master found that the Disputed Area was, in fact, Stack Island as it changed in configuration and location as a result of the natural processes of accretion and erosion. Respondents submit that the evidence overwhelmingly compels this conclusion – the change in shape and location over the decades can be traced map to map and aerial photograph to aerial photograph. Louisiana, predictably, disagrees. Louisiana contends that sometime around 1883, between the time of the patent survey in 1881 and the patent issuance in 1888, Stack Island was completely "washed away." Louisiana's position in this regard is largely based on assumptions and extrapolations developed by its expert witnesses.

Simply stated, the pivotal issues in this litigation are (1) what happened to Stack Island after 1881 and (2) under those facts, what results follow under the Rule of the Thalweg and its Island Rule exception.

I. LOUISIANA HAS MISCONSTRUED RESPONDENTS' POSITION REGARDING THE HISTORY OF STACK ISLAND AND THE LEGAL CONSEQUENCES THAT FOLLOW THEREFROM

As a preliminary matter, it should be noted that Louisiana's treatment of Stack Island's history and of

[3] There is nothing unusual about one state's land being situated across the river and up against another state. This occurs with regard to Mississippi and Louisiana all up and down the river.

Respondents' position in that regard is inaccurate and fosters confusion. Accordingly, Respondents believe that it is important that those matters be clarified at the outset.

a. History of Stack Island

In 1888, a federal land patent for Stack Island (also known as Island No. 94) was issued to the Houston Group's predecessor in title. Under applicable law, the patent was effective as of 1881, the time of the patent survey. It is this "patented" Stack Island that is the subject of the parties' dispute and of the discussion set forth below.

All the parties are in agreement that Stack Island originally "formed"[4] as Mississippi land – with the main downstream navigation channel on the west or Louisiana side and a secondary or "chute" channel on the east or Mississippi side. Under the Rule of the Thalweg and the Island Rule, the effect of this is twofold:

1. Because the downstream navigation channel or "thalweg" lay to the west of the island, the interstate boundary ran to the west of

[4] Respondents submit that the evidence reflects that Stack Island has been in continuous existence and east of the boundary thalweg since prior to Mississippi's statehood in 1817 through the time of the patent survey in 1881 (and to the present). Louisiana contends that the "pre-1817" island washed away (this being the first of three "disappearances" urged by Louisiana), but concedes that, prior to the patent survey, Stack Island "re-formed" on the Mississippi side of the navigation thalweg.

the island and, therefore, Stack Island was Mississippi land.

2. The interstate boundary would always be located west of the island regardless of any subsequent change in the navigation channel.

See Missouri v. Kentucky, 78 U.S. (11 Wall.) 395, 397, 401 (1871); *Indiana v. Kentucky*, 136 U.S. 479, 508-09 (1890). There is no disagreement among the parties in this regard.

By 1882-83, the eastern "chute" channel had enlarged[5] and the Mississippi River Commission ("MRC") had commenced its channel control work in the vicinity of Stack Island. Ultimately, dikes were constructed along the Mississippi bank to the head of Stack Island to close the eastern channel and force the river along the west of the island toward the Louisiana bank. This channel control work is described in the MRC reports in evidence as Exhibit LA-18A.

By 1901, accretions to Stack Island had caused the island to grow substantially to the west. As a result, the island, which was approximately 117 acres at the time of the patent survey in 1881, had grown several times larger

[5] Louisiana has contended that the "chute" channel became the main downstream navigation course prior to the patent survey in August 1881. Respondents disagree, but whether the navigation course had shifted from the west to the east at that time is not relevant in this litigation. Even if it did, under the Island Rule, the boundary thalweg remained to the west of Stack Island.

by 1901. [*See* Exhibit LA-SE-11.][6] During this same time period, the river had eroded away substantial acreage along the Louisiana bank.

Between 1901 and 1913, the Mississippi River breached the dike work constructed by the MRC and reestablished a flowing channel to the east of Stack Island. By 1913, this east channel had been adopted as the main navigation channel.

From 1913 through approximately 1937, the Mississippi bank was scoured away by the river and in places was cut away by 2,600 to 3,500 feet.[7] During this same time period, the river eroded away the eastern portion of Stack Island. As a consequence, the island, which had grown to the west to a very substantial size by 1901, lost a significant amount of acreage on the east side. This is reflected on the overlay exhibits used in the proceedings before the Special Master.[8]

[6] Louisiana contends that in 1883, between the time of the 1881 patent survey and the 1901 survey referenced in the text, Stack Island had "washed away" completely (this is the second of the three such "disappearances" posited by Louisiana). Louisiana argues, therefore, that the island shown on the 1901 survey is not traceable to the Stack Island patented to the Houston Group's predecessor in title. Louisiana's claim that Stack Island "disappeared" in 1883 is addressed in detail below. It is sufficient here to note that the "disappearance" is not convincingly supported by the record evidence and was specifically rejected by the Special Master.

[7] *See* Winkley, 3 Sup. Tr. 152-59; Exhibits P-SE-50-P-19, P-SE-50-P-20, and P-SE-50-P-24.

[8] *See* Exhibits P-SE-50-P-18 through P-SE-50-20, and P-SE-50-P-24.

Between 1913 and the mid-1950's, Stack Island continued to grow to the west and to erode on the east, giving the appearance of "migration" by the island. The boundary channel to the west, now a minor channel, was in the process of silting-in. Ultimately, in approximately 1954, water ceased to flow in the boundary channel. [*See* Austin Smith testimony before Judge Barbour, Tr. 340, 396-97; Austin Smith prepared testimony, Exhibit P-PT-1 at 8; Exhibit P-30.][9]

To summarize, Stack Island commenced as Mississippi land; it grew substantially to the west through accretions (multiplying to several times its size at the time of the patent); and subsequently diminished in size by erosion on the eastern side. At no time did the island ever cease to exist as an identifiable island formation.

b. Legal effect of the foregoing facts

Respondents believe that the legal effect of the foregoing historical facts relating to Stack Island may be simply stated.

> ***First***, under the Rule of the Thalweg and the Island Rule, the boundary thalweg was established in the river channel to the west of Stack Island. As stated previously, there is no disagreement in this regard.

[9] From the mid-1950's to the present, the erosion and accretion has continued, albeit in a relatively minor scope, and Stack Island or the Disputed Area now consists of approximately 2000 acres. [*See* Exhibits P-SE-40 and P-SE-31(A)-(E).]

> ***Second***, so long as water continued to flow in the boundary channel to the west, the boundary itself remained "ambulatory" in the western channel.
>
> ***Third***, as Stack Island grew by accretions to the west and the river channel moved to the west, so did the thalweg in order to maintain the integrity of Mississippi's sovereignty over the island under the Island Rule.
>
> ***Fourth***, when water ceased to flow in the boundary channel to the west of Stack Island, the boundary became "fixed."

Respondents submit that the foregoing conclusions necessarily follow from a straightforward application of the Rule of the Thalweg and the Island Rule.

II. LOUISIANA'S CHARACTERIZATION OF THE PROCEEDINGS BEFORE THE SPECIAL MASTER IS BOTH INACCURATE AND INAPPROPRIATE

In its Exceptions, Louisiana has mischaracterized the proceedings before the Special Master in significant respects, and Respondents believe that those misstatements should be noted and corrected.[10]

[10] Section II does not purport to be an exhaustive listing of the errors in Louisiana's Exceptions but is, instead, a sample of the principal inaccuracies.

a. Louisiana's attack on the competence and integrity of the Special Master

In its Exceptions, Louisiana attacked both the competence and the integrity of the Special Master. Louisiana impugns Judge McKusick's integrity by implying that he had "prejudged" the matter adversely to Louisiana, asserting that he was intent on "forc[ing] pre-determined conclusions" and that he acted "in an obvious procrustean effort to force a pre-determined legal result."[11] The Special Master's competence is assailed by Louisiana's assertion that he was capable of assembling and organizing documents and other evidentiary material,[12] but was "overwhelmed" by the "complexities" of the case. "Unfortunately, the intricate, detailed, and sometimes subtle scientific and technical presentations proved overwhelming to an otherwise observant Special Master." [Exceptions at 14]

In truth, Louisiana's professed dissatisfaction with the Special Master has nothing to do with his competence or integrity. Rather, it finds root in the fact that he did not embrace Louisiana's arguments but, instead, saw them for what they are – hypothetical theories. With reference to Louisiana witness Brien Winkley, the Special Master stated:

> His expert opinion as to what *might* or even *should* have happened to Stack Island, however, cannot overcome what *did* happen to Stack

[11] *See* Exceptions at 6 and 24.

[12] *See* Exceptions at 2.

> Island as shown uninterruptedly by the succession of maps through the years from 1881 until beyond the time when water ceased to flow between the transformed Stack Island and the Louisiana shore. *See* Appendix D.

[Final Report at 24 (emphasis in original)]

To be sure, it is not unusual these days to see expert witnesses attempt to devise theories and explanations that favor their employer's position. However, contrary to Louisiana's protestations, this is not a complicated case; and, Louisiana's theories and assumptions would have been far from compelling to the ordinary juror, much less to someone of Judge McKusick's background and experience. The Special Master's refusal to "buy in" to Louisiana's arguments does not mean that he "ignored" them, "disregarded" them, "misunderstood" them, or had a "preconceived" mindset against them. The truth of the matter is that, after painstaking review and analysis, the Special Master simply did not find the extrapolations of Louisiana's experts to be convincing.[13]

Louisiana's attack on the Special Master is not worthy of these proceedings.

[13] Louisiana also falsely states that the Special Master simply adopted Judge Barbour's findings. As indicated in the Final Report, however, and as reflected by the manner in which the supplemental proceedings were conducted, it is clear that the Special Master reached his conclusions independently. [*See* Final Report at 17.]

b. Louisiana's misattribution of its "disappearing island" theory

At several places in its Exceptions, in an apparent attempt to give credence to its "disappearing island" theory, Louisiana attributes findings to Judge Barbour that he never made. At pages 6 and 10 of the Exceptions, Louisiana contends that, in the district court proceedings, Judge Barbour "correctly found" that Stack Island had "washed away entirely" and "disappeared." In fact, Judge Barbour never made any such finding. The reference cited by Louisiana is to that portion of Judge Barbour's opinion that stated Louisiana's position. Judge Barbour rejected Louisiana's "disappearing island" theory and made exactly the opposite finding.

> The Court does not accept the theory of the Louisiana parties. It is clear from the Louisiana exhibits themselves, LA-21, 27, and 29, that there has always been a land mass from 1881 to the present time which map by map can be traced from the original Stack Island. . . .
>
> The Court concludes by a preponderance of the evidence that the land mass which now lies against the Louisiana bank and which is the portion claimed by the Plaintiffs, is Stack Island in the sense that it is the original island as it originally existed in 1881 plus accretions less erosion. . . .
>
> . . . [T]here is no testimony whatsoever that Stack Island disappeared. The Court simply thinks that the Louisiana parties' position that Stack Island disappeared because it moved from under the location of the original Stack Island is not well taken. . . .

[No. 91-1158; Pet. for Cert. App. 32a-33a]

The notion that Stack Island "disappeared" was invented by Louisiana and, contrary to Louisiana's argument, was expressly rejected by Judge Barbour.

c. Louisiana's vacillation on the boundary issue

Louisiana has been involved in this boundary dispute for approximately eight years. During that time, Louisiana has embraced varying views of the interstate boundary in the vicinity of the Disputed Area. Prior to closing argument, the Special Master instructed the parties to clearly state their position on the boundary issue. Thereafter, Louisiana stated its contention that the interstate boundary in the vicinity of the Disputed Area was the "live" thalweg – the current downstream navigation course.

> So we believe the active channel rule is the correct rule, the rule enunciated in the 1984 case, and that the current channel line should represent the boundary between the states in this case.

[Attorney Keyser, 5 Sup. Tr. 207; *see generally* 5 Sup. Tr. 204-207] In light of Louisiana's litigation strategy and its witnesses' testimony during the supplemental proceedings, this was the only position Louisiana could take.

Previously, Louisiana had argued for a "frozen" boundary east of Stack Island in its 1881 location. However, in the proceedings before the Special Master, Louisiana had to abandon that position in order to attack the federal land patent. Accordingly, Louisiana explicitly adopted the position (1) that the "pre-statehood" Stack Island "disappeared," (2) that the Stack Island patented in 1888 had originally formed as Mississippi land after statehood, and (3) that the patented Stack Island had subsequently been "washed away" and "disappeared."

In the face of those three matters, Louisiana could not take any other position regarding the boundary. Louisiana's previous position – that the thalweg was "frozen" east of Stack Island (the Hatley Harrison boundary line) – was flatly precluded by Louisiana's concession that Stack Island formed as Mississippi land, having been "severed from the [Mississippi] landmass by sudden and avulsive acts of the river a short time before the 1881 survey."[14] If, in fact, the island was "severed" from Mississippi, as Louisiana claimed, Stack Island constituted Mississippi land.

Now, however, in its Exceptions, Louisiana appears to take both the "frozen thalweg" position and the "live thalweg" position. [*See* Louisiana's Prayer for Relief,

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[14] Louisiana's Trial Brief to the Special Master ("La. Br.") at 11. It is Respondents' position that Stack Island has continuously been in existence since prior to statehood. Regardless, however, Louisiana's admission that Stack Island formed on the Mississippi side of the boundary thalweg (whether prior to statehood or shortly before the patent) precludes any argument that the boundary was east of Stack Island at the time the island was patented. [*See* Final Report at 15.]

Exceptions at 29.] This "whipsawing" between theories is improper and undercuts any contention that Louisiana's position is "irrefutable" or "conclusive."[15]

d. Louisiana's mischaracterization of record evidence regarding the Austin Smith line

Louisiana's Exceptions completely misstate the facts with regard to the interstate boundary urged by Respondents. As stated previously, Respondents assert that the proper boundary line runs in the former river channel to the west of Stack Island, which silted-in and ceased to flow in the 1950's. However, Louisiana argues that the Respondents' boundary line "transects property owned and occupied historically by Louisiana riparians who have farmed it since just after the turn of the century." [Exceptions at 3; *see also id.* at 7.] That statement is patently and irretrievably false.

The Respondents' boundary line runs along the western edge of the Disputed Area, and the Disputed Area has never been "owned" or "occupied" or "farmed" by Louisiana riparians, much less since "the turn of the

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[15] Louisiana's vacillation regarding the boundary has not been limited to the proceedings in No. 91-1158 and this original action. In the 1970's, the Lake Providence Port Commission investigated its claim to Stack Island and determined that it had no claim to or interest in the "accretion area lying along the Louisiana shore immediately south of Stack Island." [*See* Exhibits P-83 and P-112.] During this same period of time, the Louisiana Department of Public Works, through its director Hatley Harrison, investigated Louisiana's claim to the Disputed Area but never asserted any claim. [*See* Exhibits P-80 through P-84, P-87, P-88, P-90, P-91, and P-92.]

century." Louisiana's own briefing and witnesses prove this. In its Exceptions, Louisiana itself claims that the Disputed Area did not form until the 1930's and acknowledges that it formed "in the place of eroded Louisiana riparian land." [Exceptions at 16; *see also id.* at 8.] Louisiana's witness Winkley admitted that the Louisiana bank had been dramatically cut away by the river, in places by as much as 2,500 feet. [*See* Winkley, 3 Sup. Tr. 218.][16] It is incorrect, therefore, to state the boundary line "transects property owned and occupied historically by Louisiana riparians" because, as Louisiana concedes, the property they may have farmed had long since eroded away.

In a related misstatement regarding the location of the Respondents' boundary line, Louisiana falsely states that Mississippi expert Austin Smith "admitted on cross-examination that his boundary line was between 7,000 to 8,000 feet too far to the west from the true thalweg." [Exceptions at 3] This is nothing but a word game. The so-called "true thalweg," as Louisiana calls it, is ***not*** the boundary thalweg but, instead, is the current "live" navigation course, which is not relevant under the Island Rule. Here, Louisiana is attempting to substitute what it

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[16] Finally, Louisiana totally distorts the testimony of one of Respondents' witnesses, Robert Jarvis. According to Louisiana, Robert Jarvis "does not dispute" that the Austin Smith line "transects Louisiana farmland on the river side of the Louisiana levee which was never washed away or re-built by the river"; and, per Louisiana, Jarvis "feels that since he has hunted in the general vicinity from time to time and has walked across some of these properties, he has a good claim of ownership." [Exceptions at 7] Mr. Jarvis has never said anything of the sort.

has elsewhere called a "geologic" thalweg for the boundary thalweg depicted by Austin Smith. Under the Island Rule, the boundary thalweg and current navigation course may, in fact, diverge by thousands of feet, but, as Louisiana well knows, it is only the boundary thalweg that is relevant.

Louisiana also pretends that there is no record support for Respondents' boundary line as determined by Austin Smith. In this regard, Louisiana maintains a studied silence regarding (1) the establishment of the boundary thalweg to the west of Stack Island and (2) the movement of the thalweg with the river channel in advance of the accretions building on the west side of Stack Island. Under the rule stated in *Arkansas v. Tennessee*, 246 U.S. 148 (1918), the boundary became "fixed" when water ceased to flow in the boundary channel.

> So long as that channel remains a running stream, the boundary marked by it is still subject to be changed by erosion and accretion; but when the water becomes stagnant, the effect of these processes is at an end; the boundary then becomes fixed in the middle of the [old] channel as we have defined it, and the gradual filling up of the bed that ensues is not to be treated as an accretion to the shores but as an ultimate effect of the avulsion. The emergence of the land, however, may or may not follow, and it ought not in reason to have any controlling effect upon the location of the boundary line in the old channel.

246 U.S. at 175. Austin Smith's testimony in this regard is set out in the transcript of the trial before Judge Barbour at pages 280-82 (generally 328-403). [*See also* Exhibit LA-

SE-147.][17] Louisiana's argument that Austin Smith's line is without evidentiary support is absolutely incorrect.

e. Louisiana's accusations regarding the "new island"

Louisiana distorts the scope of Respondents' claims in this litigation by its misleading statement that Respondents "are claiming possession, jurisdiction, and sovereignty of both the land accreted to Louisiana [the Disputed Area] and to the 'new' Stack Island near Mississippi." [Exceptions at 10-11] The fact of the matter is that this litigation involves only the Disputed Area. Contrary to Louisiana's insinuation of "treachery" – there has never been a claim to the "new" island (referred to as "Rabbit Island" at page 22 n.11 of the Final Report). Louisiana's attempt to sow confusion is improper and should be rejected.

III. A STRAIGHTFORWARD APPLICATION OF THE RULE OF THE THALWEG AND THE ISLAND RULE PLACES THE INTERSTATE BOUNDARY ALONG THE WESTERN EDGE OF THE DISPUTED AREA

It has been Respondents' position throughout that, under the Rule of the Thalweg and its Island Rule

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[17] Because in 1954 the western river channel had not been used for navigation for some time, hydrographic data was not retrieved for that year. However, Exhibit LA-SE-147 reflects hydrographic data for 1948, which confirms that Austin Smith's line was correctly placed. [*See also* Exhibits LA-SE-21 and LA-SE-22, which are 1950 and 1952 hydrographic surveys and which confirm the further "silting-in" of the boundary channel, as described by Austin Smith.]

exception, the boundary between Mississippi and Louisiana in the area in question runs along the western edge of the Disputed Area. Respondents submit that this necessarily follows from a straightforward application of the Island Rule, which holds that a boundary thalweg always remains on the same side of an island, regardless of a subsequent change in the downstream navigation course. *See Missouri v. Kentucky*, 78 U.S. at 397; *Indiana v. Kentucky*, 136 U.S. at 508-09; *Uhlorn v. United States Gypsum Co.*, 366 F.2d 211 (8th Cir. 1966), *cert. denied*, 385 U.S. 1026 (1967); *Davis v. Anderson-Tully Co.*, 252 F. 681 (8th Cir. 1918).

In this case, it is undisputed that the boundary thalweg was west of Stack Island in its pre-patent location and, therefore, that Stack Island was Mississippi land. Accordingly, under the Island Rule, when the navigation channel shifted to the east side, the boundary remained to the west of Stack Island in order to maintain the integrity of Mississippi's sovereignty over the island. This conclusion is the central premise and inevitable result of the Island Rule.

Louisiana has devised two theories in its attempt to avoid the implications of the Island Rule. Neither theory, however, finds compelling support in the record, and both theories were carefully considered and squarely rejected by the Special Master.

a. Louisiana's "disappearing island" theory

Louisiana's first theory for avoiding the implications of the Island Rule is its "disappearing island" theory.

Louisiana contends that Stack Island "disappeared" or "washed away entirely" on three separate occasions – in 1811 (as a result of the New Madrid earthquake), in 1883 (after the patent survey), and in 1948. Accordingly, the argument goes, there simply is nothing to "trigger" the Island Rule and nothing for the boundary thalweg to "stay west of." Louisiana's "disappearing island" theory fails on the facts. Indeed, after a careful examination of the entire record, the Special Master found the conclusion "inescapable" that "Stack Island never washed away, and it is now the Disputed Area." [Final Report at 22]

1. The 1811 and 1948 "disappearances"

The 1811 "disappearance," if it did occur, is irrelevant. Even if it did occur, Louisiana has conceded that a new island subsequently formed within Mississippi and was ultimately patented to the Houston Group's predecessor in title. All the parties – Louisiana, Mississippi, and the Houston Group – agree that the Stack Island that was patented was Mississippi land with the boundary thalweg to the west. Accordingly, the 1811 "disappearance" makes no difference in the boundary determination.

Louisiana's claim of a 1948 "disappearance" is difficult to understand, but appears simply to be an exercise in misdirection. By 1948, it should be noted that Stack Island had completed its accretion to the west and was

located near the Louisiana bank. It is featured on Louisiana's own maps.[18] [*See, e.g.* Exhibits LA-23 and LA-SE-147.] Apparently, Louisiana's reference to the river bed being "scoured clean" and "swept clear" is ***not*** to Stack Island in its location as the Disputed Area but, instead, to the area occupied by Stack Island in 1881 prior to migration. [*See* Exceptions at 6; 24-25.] Louisiana's own witnesses conceded on cross-examination that, in 1948, Stack Island existed and had an elevation of five feet above "ordinary high water." [Mayeux, 4 Sup. Tr. 165-67; Winkley, 3 Sup. Tr. 166-67] Furthermore, as the Special Master noted, in its 1948 location, Stack Island had trees that in 1994 were 60 to 70 years old and, therefore, in 1948 were 14 to 24 years old. [Final Report at 21]

Louisiana's claim that Stack Island had "disappeared" by 1948 is plainly incorrect. Neither the maps nor Louisiana's witnesses support that claim. Accordingly, it should be rejected.[19]

2. The 1883 "disappearance" and the "lunch map"

The contention that Stack Island "disappeared" around 1883 became the centerpiece of Louisiana's trial strategy. Louisiana's theory in this regard rests on the

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[18] In the 46 plus years since 1948, of course, Stack Island/the Disputed Area has been subjected to additional accretion and subsequent erosion.

[19] It is clear that, in 1948, Stack Island had diminished considerably from its 1901 size. It is equally clear, however, that the island was still very much in existence with substantial stands of timber.

slender thread of a solitary document of curious origin – the "lunch map" (so named because it first came to light during the cross-examination of Louisiana witness Brien Winkley, who had been supplied with the map during the lunch break by another Louisiana witness, Michael Mayeux).

It should be remembered that the island had been surveyed in August 1881 and the patent was issued in 1888. At the time of the island's supposed "disappearance," Stephen B. Blackwell and his family were living and farming on the island. Blackwell and two others gave sworn testimony in May 1885 that Blackwell and his family had continuously lived on Stack Island from April 1882 through the date of the testimony – the precise time period during which Louisiana theorizes that Stack Island "washed away." [*See* P-SE-20; *see also* Final Report at 20-21.]

Again, the sole basis for Louisiana's position is an overly-aggressive interpretation of the lunch map (Exhibit LA-SE-159-Orig), which purports to reflect 1883 hydrographic data and to depict a steamboat sailing line close to the edge of the 1881 outline of Stack Island.

An understanding of the manner in which Louisiana uses the lunch map clearly reflects the hypothetical nature of Louisiana's position. To reach the conclusion that Stack Island had disappeared by 1883, Louisiana (1) takes the depicted sailing line, (2) selects a sailing channel width of 1500 feet, (3) assigns 750 feet of the postulated channel to the east of the sailing line, which would bring the eastern portion of the 1500 foot channel into Stack Island as it existed in 1881, and (4) concludes that

the presumed erosion of part of the island means that the entire island was obliterated. The foregoing string of assumptions is the basis for Louisiana's claim that Stack Island "disappeared" in 1883.

Louisiana's treatment of the lunch map is mere hypothesis and conjecture. Louisiana's conclusion is flatly precluded by actual recorded facts, not the least of which is the fact of the Blackwell family's continuous residence on the island from April 1882 through May 1885, as sworn to by numerous witnesses. The flaws in Louisiana's analysis are obvious – (1) the 1500 feet channel width was, at best, "aspirational" and there is no evidence that such a channel was ever developed by April 1883;[20] (2) partial erosion, if it did in fact occur, is not the equivalent of total obliteration and, as the Special Master noted, even with the depicted sailing line boats could have passed close to Stack Island without all of the island being "washed away." [Final Report at 20] It should also be noted that the lunch map itself rejects the notion that Stack Island had "completely washed away" – the map reflects the placement of a government navigation light on the island, thus arresting any claim that the island had "disappeared." [*See* LA-SE-159-Orig.]

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[20] Mr. Winkley conceded that the sailing line depicted on the lunch map was about the same distance from Stack Island as the navigation course was from the Louisiana bank in his depiction on LA-SE-11. [*See* Winkley, 5 Sup. Tr. 34-39.] Accordingly, the hypothetical assumption of a 1500 feet wide channel is simply that – hypothetical – and has not held true under Louisiana's own analysis.

Not only does the lunch map fail to support the notion of an 1883 "disappearance," that notion is completely foreclosed by Exhibit P-SE-23, which is a hydrographic survey published by the Mississippi River Commission. Louisiana's own expert, Mr. Winkley, testified that, in his opinion, Exhibit P-SE-23 was more reliable than the lunch map. [*See* Winkley, 3 Sup. Tr. 232.] Exhibit P-SE-23 reflects hydrographic data for April 1883 and unequivocally depicts the continued existence of Stack Island. That exhibit completely negates Louisiana's theoretical analysis of the lunch map and emphatically rejects the notion that Stack Island had "disappeared" in 1883. Louisiana's own testimony reflects this as Mr. Winkley conceded on cross-examination that the entire island had not necessarily washed away. [*See* Winkley, 3 Sup. Tr. 246.]

Nothing is known about the circumstances under which the lunch map was prepared or used. Although it purports to reflect hydrographic information from the Mississippi River Commission, it was never published by the MRC. Furthermore, it is not known whether the map, if authentic, represents preliminary work or a finished product.[21] By contrast, Exhibit P-SE-23 is an official and final product of the Mississippi River Commission. It relates precisely to the time period by which Louisiana contends the island had "disappeared" and it clearly demonstrates that no such "disappearance" ever took place. Louisiana's theory in this regard should be rejected.

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[21] No explanation was given for how the document came into Mr. Mayeux's possession.

Finally, it should be noted that the Mississippi River Commission was in the midst of its extensive work in this area, and nothing in the MRC reports reflects that Stack Island ever "disappeared." Instead, in its description of the work done, the November 1883 MRC report confirms the continued existence of Stack Island:

> [T]his work showed good results, forcing the main channel of the river to the right [west] of the island and building a bar to the head of Stack Island, as shown by the high water survey of April 1883.

[Exhibit LA-18A at 425] If, as Louisiana contends, Stack Island had been obliterated in early 1883, the November 1883 MRC report would have reflected that fact and would certainly have read much differently. There simply is no basis for any claimed "disappearance" by 1883.

b. Louisiana's "true island" theory

The second theory developed by Louisiana in its effort to avoid the Island Rule should also be rejected. Louisiana contends that Stack Island did not constitute a "true island" and, therefore, did not implicate the Island Rule. A "true island," according to Louisiana, is an island whose elevation is greater than "top bank."[22]

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[22] This "true island" theory was variously formulated by Louisiana as requiring elevation above "ordinary high water" or "mean high water" or "top bank." Notwithstanding Louisiana's proposed definitions, Louisiana witness Winkley admitted that he could not define "ordinary high water" or "mean high water" and that neither the MRC, the Corps of Engineers, nor anyone else to his knowledge maintained data reflecting

Louisiana has conceded that, as patented, Stack Island's elevation exceeded "high bank." Accordingly, Louisiana apparently argues that the elevation of Stack Island periodically dropped below "true island" status and, therefore, that the Island Rule periodically ceased to apply. This "in again, out again" theory makes no sense and fails both on the law and on the facts. Such a litmus test for a "true island" has never been applied or even recognized in any Island Rule case, and it has no basis in law or in logic. Furthermore, as Louisiana's witnesses have conceded, the elevation of Stack Island did, in fact, exceed "top bank" elevation, and, therefore, the "true island" theory is simply beside the point.

The first answer to Louisiana's newly-devised theory is that Stack Island, in fact, had elevations exceeding "top bank." Louisiana's own witnesses conceded this. [*See* Winkley, 3 Sup. Tr. 63, 118-19; Mayeux, 4 Sup. Tr. 165-67.] The documentary exhibits in evidence also reflect

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"mean high water" or "ordinary high water." [*See* Winkley, 3 Sup. Tr. 120-28.] Top bank, therefore, was apparently substituted to avoid the absence of "definitional data," but "top bank" is, itself, problematic. Louisiana does not indicate what they would do in the rather common circumstance of one bankline being dozens of feet different in elevation from the other. Mr. Winkley also indicated that he had never seen anything defining islands in these terms until another Louisiana witness, again Mr. Mayeux, supplied him with such a definition. [*Id.* 239-40]

elevations satisfying Louisiana's "true island" requirement.[23] Accordingly, even under Louisiana's theory, which is not appropriate and has never been used in an Island Rule case, Stack Island qualifies as a "true island."

The second answer is that there is simply no legal support for Louisiana's "true island" theory. Without exception, the legal authorities referenced in Louisiana's Exceptions are inapposite – they have nothing to do with the definition of an island for purposes of applying the Island Rule and determining an interstate boundary. The "Submerged Lands Act," 43 U.S.C. § 1301, is completely unrelated to the Island Rule. *Borax Consolidated v. City of Los Angeles*, 296 U.S. 10 (1935), dealt with a seaward boundary tidelands question and did not deal with the definition of an island for Island Rule purposes. *Texas v. Louisiana*, 410 U.S. 714 (1973), and *Scott v. Lattig*, 227 U.S.

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[23] *See, e.g.*, Exhibit P-12 (1882 MRC map) (Stack Island elevation is 110 feet plus; there are no bank elevations on the exhibit, but the top of the levee (which is situated on top of the bank) is shown as being between 115 and 120 feet); Exhibit P-18 (1913 map) (Stack Island elevation is 120 feet; top bank is shown at 110 to 115 feet); Exhibit P-19 (1925 map) (Stack Island elevation is 120 feet; top bank elevation is 110 feet); Exhibit P-20 (1930 map) (Stack Island elevation at 115 feet; top bank elevation at 105 to 110 feet); Exhibit P-24 (1937 map) (Stack Island elevation is 115 feet; top bank elevation is 115 feet); Exhibit LA-23 (1948 hydrographic survey) (Stack Island elevation is 40 feet; top bank is 35 feet) (a different elevation benchmark is used with this and subsequently-noted exhibits); Exhibit P-31 (1962 map) (Stack Island elevation is 50 feet; top bank elevation is 30 feet); Exhibit P-32 (1975 hydrographic survey) (Stack Island elevation is 40 feet plus; top bank elevation is 35 feet plus); Exhibit P-SE-40 (1988-89 hydrographic survey) (Stack Island elevation is 50 feet; top bank elevation is 35 feet).

229 (1913), are also silent on that issue. *Burford v. Sun Oil Co.*, 319 U.S. 316 (1943), relates to the district court's jurisdiction to enjoin administrative orders by the Texas Railroad Commission establishing well spacing requirements. It had nothing to do with islands, rivers, or elevations.

The island definition referenced by Louisiana with regard to LA-SE-122 appears to be a definition for use in connection with determining international boundaries and tidelands ownership. Given the ***daily*** ebb and flow of the tides, a "high water" definition in that context may be appropriate. However, such a definition has never been adopted for non-tidal islands and makes little sense in that context, particularly where the riparian owns to the low water mark (in Louisiana) or the bed of the river (Mississippi).

Louisiana urges a hyper-technical, surveyor-driven approach to the Island Rule. The Island Rule, however, has no such derivation or purpose. It is, instead, a common-sense doctrine born of the necessity to settle boundaries and titles. If Louisiana's approach were adopted as the rule, it would necessarily have the effect of upsetting long-established rights and expectations. It is neither necessary nor desirable in this proceeding to define an "island" for all purposes. It is particularly hazardous to borrow a definition sometimes utilized for one purpose and interject it into another context. Titles and boundaries, both public and private, tidelands areas, navigable and non-navigable streams, etc. could be implicated by such a rule.

As the Special Master noted, the only question properly at issue here is whether "Stack Island" was a land

mass sufficient to invoke application of the Island Rule. Respondents submit that the record clearly demonstrates that it was and is. Louisiana's second Island Rule avoidance theory – the so-called "true island" theory – should be rejected.

IV. STACK ISLAND HAS BEEN IN CONTINUOUS EXISTENCE AS A UNITARY ISLAND LANDFORM AND, THEREFORE, TRIGGERS THE ISLAND RULE

Louisiana employs one last device to avoid the implications of the Island Rule. In several places in its Exceptions, Louisiana makes the observation that "a mere moving mass of alluvial deposits" does not trigger the Island Rule. Louisiana then, again and again, describes Stack Island in those terms. Repetition, however, does not make it so. Stack Island has never been "a mere moving mass of alluvial deposits." Instead, Stack Island grew to the west by accretion and then diminished from the east by erosion. Contrary to Louisiana's mischaracterization, Stack Island has never been a collection of particles in suspension.

In connection with this argument, Louisiana cites *Carrick v. Lamar*, 116 U.S. 423 (1886). *Carrick* does not help Louisiana here. The holding of the Supreme Court is that the decision by the secretary of the interior was discretionary rather than ministerial and, therefore, that mandamus was properly refused by the lower court. There is no mention of – not even one word about – the Island

Rule.[24] Louisiana's resort to *St. Louis v. Rutz*, 138 U.S. 226 (1891), does not help Louisiana either. *Rutz* is a title case, not an Island Rule case or a boundary case, and it is governed by Illinois law.[25]

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[24] *Carrick* involved a request for a writ of mandamus directing the secretary of the interior to order a survey of Arsenal Island. Two successive U.S. secretaries of the interior had refused to order a survey. The former secretary of the interior had declined on the basis that (1) the island was still "drifting," thus making surveyed monuments "subject to immediate obliteration," (2) public works were underway to stabilize the island, and (3) the secretary was unsure whether the island was still subject to ownership by St. Louis as a result of a prior survey. 116 U.S. at 425. The current secretary of the interior had declined for the reason that the government was considering whether it wanted to make use of the island in its on-going public works project as opposed to placing it in the public domain. *Id.* The Supreme Court stated that all the reasons given (including the quandary regarding ownership) constituted matters of discretion and, therefore, that a writ of mandamus was properly refused. *Id.* at 426.

[25] In *Rutz*, the dispute principally centered on title to accretions to the bed of the river that subsequently joined to Arsenal or Quarantine Island. The trial court had found, as a matter of fact, that the accretions had formed on the bed of the river *on the Illinois side of the bed* and, therefore, were owned, under Illinois law, by the Illinois riparian. 138 U.S. at 247. Under those factual circumstances, the Court held that the subsequent joinder of the bed accretions to the island did not divest the Illinois riparians of their title. *Id.* at 251.

The language quoted by Louisiana from the *Rutz* opinion is actually a quote from the former interior secretary's rationale in *Carrick* and cannot, in any sense, be construed as a holding that the Island Rule does not apply under the circumstances present here.

The circumstances in the present case bear no resemblance to those described in *Carrick* and *Rutz*. Here, Stack Island grew substantially by accretions to the west side of the island[26] and subsequently eroded on the east side. The painstaking map-by-map analysis conducted before the Special Master proved the continuous existence of Stack Island as an identifiable island feature from 1881 through the present. Contrary to Louisiana's repeated suggestion, there was no "mere moving mass of alluvial deposits."

Using overlays and a light table (to permit the image from Stack Island on the later map to be overlaid on and compared to the image of Stack Island on the earlier map), Respondents' counsel demonstrated, through Louisiana's own expert witness, that Stack Island has continuously existed, in a unitary identifiable landmass, from the time of the patent to the present day. The overlays were made to identical scales (1 to 20,000) and were lined up by latitude/longitude coordinates. The overlays were then reviewed and discussed, comparing the portion of Stack Island shown on the 1882 map (P-13) with Stack Island as it was reflected in subsequent maps. The results of that comparison, which traces Stack Island from 1882 (shortly after the patent survey) through 1937 (when the transition period was largely complete), are summarized below.

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[26] Louisiana witness Winkley conceded that Exhibit LA-SE-11 demonstrated that the western accretions to Stack Island extended into what had been Louisiana ten years before. [*See* Winkley, 3 Sup. Tr. 233-34.]

maps compared	comments
P-13 (1882) P-17 (1908)	90% of 1882 island still remains in place on 1908 map (3 Sup. Tr. 149)
P-13 (1882) P-18 (1913)	70-80% of 1882 island still remains in place on 1913 map (3 Sup. Tr. 151)
P-13 (1882) P-19 (1925)	90+% of 1882 island still remains in place on 1925 map (3 Sup. Tr. 152)
P-13 (1882) P-20 (1930)	75% of 1882 island still remains in place on 1930 map (3 Sup. Tr. 154)
P-13 (1882) P-24 (1937)	65% of 1882 island still remains in place on 1937 map (3 Sup. Tr. 159)

[*See generally* Winkley, 3 Sup. Tr. 148-59.][27]

The foregoing reflects that, contrary to the mischaracterization of Louisiana, Stack Island was an island of substantial permanence and not "an agglomeration of shoals and bars." To be sure, accretion and erosion had operated on the island, as they do on all riparian features. But throughout the entire period, Stack Island clearly had sufficient permanence, stands of timber and other vegetation, elevation, etc. to implicate the Island Rule, and Louisiana has failed to provide a single case that indicates to the contrary. Accordingly, Louisiana's attempt to evade the Island Rule should be rejected.

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[27] The exhibits used were overlays made from the exhibits referenced textually. The actual overlays have the prefix "P-SE-50-" in addition to the numbers set out above. *E.g.* the 1882 overlay shown as "P-13" is actually "P-SE-50-P-13."

V. LOUISIANA CANNOT SUPPORT ITS CLAIM TO TITLE, AND ITS ATTEMPT TO CANCEL THE HOUSTON GROUP'S TITLE SHOULD BE DENIED

In his Final Report, the Special Master recommended that the Court deny Louisiana's request that the Houston Group's title to Stack Island be cancelled. Louisiana did not file any exceptions to the Special Master's findings or recommendations in that regard.

The Houston Group's title can be traced directly from a federal land patent issued by the United States to Stephen B. Blackwell in 1888 (effective 1881). The Houston Group also holds under a 1933 tax foreclosure deed from the State of Mississippi.[28] Thus, for upwards of a 100 years, the Houston Group and its predecessors have claimed legal title to Stack Island.[29]

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[28] This title is derived through instruments known as "forfeited tax patents." As a result of unpaid tax levies, the State of Mississippi acquired title to Stack Island. That title was subsequently conveyed to the Houston Group's predecessor in title – the Blackwell family. Accordingly, the Blackwell family (and the Houston Group) hold under the federal land patent issued by the United States government and under the tax instruments issued by the State of Mississippi.

[29] The record also shows that the Houston Group, its predecessors, and their respective tenants have occupied and used the Disputed Area to the exclusion of others for many years. In *Houston v. United States Gypsum Co., supra*, the Houston Group obtained a judgment from the federal court in Mississippi, affirmed by the Fifth Circuit, to the effect that the Houston Group has acquired title (by adverse possession) to that portion of the island that encroached upon lands held by Mississippi riparian owners.

In its briefing before the Special Master, Louisiana attempted to attack the validity of the federal land patent. Judge McKusick, however, properly determined that such a challenge is time-barred.

> This challenge should be rejected both on the ground that federal land patents enjoy a presumption of validity and on the ground that the attack, which comes 106 years after the issuance of the patent and 177 years after Mississippi statehood, is time-barred on a laches principle.

[Final Report at 30 (citations omitted)]

Even setting aside, for the moment, the issue of laches, Louisiana's attack itself is substantively flawed. Louisiana argued that Stack Island was not in the federal public domain but belonged to Mississippi and, therefore, that the federal government had no title to transfer by patent.[30] To that end, Louisiana argued that the government surveyor "simply failed to do proper analysis of map materials," that he "should have concluded" that Island No. 94 "was not in existence at the time of sovereignty of either state," and that "it was attached to the

[30] The premise of this argument is Louisiana's contention that Stack Island "disappeared" in 1811. Louisiana provided little detail in support of this assertion and fails to address the evidence detailed in Respondents' Joint Trial Brief to the effect that the island was in existence on the Mississippi side of the boundary thalweg prior to Mississippi's statehood in 1817. Accordingly, even if the pre-1812 island did "wash away," which is not proven, the evidence indicates that Stack Island was in existence prior to Mississippi's sovereignty. Consequently, the United States would have retained title to the island, which was then transferred to the Houston Group's predecessor in title by federal land patent.

Mississippi land mass as a bar formation and not an island just a few years prior to survey." [Louisiana Brief at 12, 13][31] Louisiana speculates as to what went on in the mind of the deputy surveyor more than 100 years ago and says that the deputy surveyor "made several errors." [Louisiana Brief at 16]

This speculation regarding what the surveyor did or did not know, or should or should not have done, is precluded by the Supreme Court's decision in *St. Louis Smelting & Refining Co. v. Kemp*, 104 U.S. (14 Otto) 633 (1882). There, the Court held that the issuance of the patent was conclusive with regard to the facts implicit in the decision to issue the patent. The Court reasoned that the decision made by United States officials charged with responsibility for the issuance of patents was analogous to a judgment of a court having jurisdiction. Treating the issuing decision in that fashion precludes the type of argument that Louisiana makes here. A court has authority to determine facts that vest it with jurisdiction; the land department officials have the same authority. But even if they did not, the day for an attack on their factual determination of the factual underpinnings of their action has long since passed.

The patent to Stephen B. Blackwell is presumptively valid. Even if Louisiana were permitted to go behind the factual underpinnings of the patent under the *St. Louis Smelting & Refining Co. v. Kemp* doctrine, it was Louisiana's burden to establish facts that would render the

[31] Even if this were true, Louisiana has never been able to explain how land "attached to the Mississippi land mass" ever becomes Louisiana land.

patent invalid, which Louisiana failed to do. Louisiana had an immense, if not impossible, burden of establishing that the land department officials erred in their factual determinations, and, in point of fact, not even Louisiana contends that it has proved the speculative inferences it draws with respect to the thinking of the deputy land surveyor regarding the issuance of the patent. Even if Louisiana could properly, at this late date, challenge a federal patent, Louisiana failed to provide any evidence that would support such a challenge.[32]

Louisiana's attack on the federal patent to Blackwell fails to account for two very important matters regarding the title issue. First, regardless of the federal patent (which Respondents maintain is valid), the Houston Group also traces its title to the State of Mississippi – independent of the federal land patent to Blackwell. Louisiana's attack is directed at showing that the United States did not have title to convey. Louisiana does nothing to negate title acquired through the State of Mississippi.

The second omission on Louisiana's part is equally compelling – Louisiana's brief is conspicuously silent regarding how Louisiana is supposed to have acquired title. It is again worth noting that Louisiana has conceded that Stack Island, prior to the patent, was located within Mississippi's boundaries. In the face of this, the absence

[32] Even the United States is barred by limitations from attacking a patent after six years. 43 U.S.C. § 1166 (1986).

of any attempt on Louisiana's part to explain and support its claim of title is a telling omission.[33]

VI. THE DISPUTED AREA CONSTITUTES MISSISSIPPI LAND UNDER THE RULE OF ACQUIESCENCE

In his Final Report, the Special Master did not make any specific findings or recommendations regarding the parties' claims under the Rule of Acquiescence. Perhaps the reason for this may be found in the fact that Louisiana's position in this regard is wholly dependent on its theory that Stack Island "disappeared." Regardless, Respondents' position on acquiescence is set forth below.

The Rule of Acquiescence is well-settled. In applicable cases, it displaces the Rule of the Thalweg and controls the determination of an interstate boundary. The Rule of Acquiescence, sometimes called the Rule of Prescription and Acquiescence, holds that a state acquires or establishes sovereignty with regard to particular land when the state has asserted long and continuous jurisdiction and authority over that land with the acquiescence of another state or states. *Vermont v. New Hampshire*, 289 U.S. 593, 616 (1933); *Virginia v. Tennessee*, 148 U.S. 503, 510

[33] Louisiana is a "stranger to the patent" and, therefore, has no standing to level a challenge thereto. Furthermore, to the extent that Louisiana purports to assert title as a result of quit claim deeds from Louisiana riparians, they too are strangers to the patent and are without standing. It is worth noting that some of the hunting leases and quit claim deeds touted by Louisiana reference the Austin Smith line. [*See, e.g.* Mr. House's quit claim deed, Exhibit P-SE-44.]

(1893); *Indiana v. Kentucky*, 136 U.S. 479 (1890); *Oklahoma v. Texas*, 272 U.S. 21, 47 (1926); *Arkansas v. Tennessee*, 310 U.S. 563, 569, 571 (1940); *Georgia v. South Carolina*, 497 U.S. 376, 389-93 (1990); *Illinois v. Kentucky*, 500 U.S. 380, 384 (1991) (recognizing the rule but holding it not applicable under the facts).[34] The Rule of Acquiescence has been applied in boundary controversies between Louisiana and Mississippi. *Louisiana v. Mississippi*, 202 U.S. 1 (1906).

a. Factors to be considered under the Rule of Acquiescence

The application of the Rule of Acquiescence is purely a question of fact. *Arkansas v. Tennessee*, 310 U.S. at 567 (exercise of jurisdiction and dominion and acquiescence characterized as "that question of fact"). And, the Supreme Court has identified various facts and events to be considered as evidence of the exercise of sovereignty, dominion, and control.

1. Unchallenged patents issued by the United States showing property to be in a particular state are probative of a claim of sovereignty and acquiescence. *Louisiana v. Mississippi*, 202 U.S. at 55-56.

2. The assessment and collection of taxes over a long period of time are evidence of the exercise of sovereignty and control. *Arkansas v. Tennessee*, 310 U.S. at

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[34] As with other rules dealing with sovereignty and boundary law, the underlying rationale is similar to the rules applicable to private rights.

567-68; *Vermont v. New Hampshire*, 289 U.S. at 616; *Louisiana v. Mississippi*, 202 U.S. at 55; *Virginia v. Tennessee*, 148 U.S. at 510.

3. The exercise of criminal and civil jurisdiction by the courts of a state are treated as acts of sovereignty. *Indiana v. Kentucky*, 136 U.S. at 518-19.

4. Township surveys prepared by the United States General Land Office have been regarded as evidence of the exercise of jurisdiction and sovereignty. *Indiana v. Kentucky*, 136 U.S. at 512-14; *Louisiana v. Mississippi*, 202 U.S. at 53.

5. Grants by the state to individuals have been treated as acts of sovereignty. *Indiana v. Kentucky*, 136 U.S. at 516-18; *Louisiana v. Mississippi*, 202 U.S. at 52-53.

6. Acts and recognitions of state officials and individuals that tend to show in which state the land is located have been regarded as indicative of the exercise of sovereignty. *Louisiana v. Mississippi*, 202 U.S. at 56; *Arkansas v. Tennessee*, 310 U.S. at 565-68; *Oklahoma v. Texas*, 260 U.S. 606 (1923).

7. The general reputation and treatment by private citizens is also relevant to the application of the doctrine. *Arkansas v. Tennessee*, 310 U.S. at 567; *Oklahoma v. Texas*, 260 U.S. at 635-36.[35]

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[35] The fascinating article in the *Vicksburg Sentinel* of June 1847 regarding the execution of Ben Vincent, while admittedly remote and legendary, is nevertheless relevant. It shows, if true, that the Indian residents of Stack Island regarded the island as being subject to Mississippi criminal laws. This confirms the

8. Occupancy, cultivation, and other use is not only evidence of a claim of ownership but also of the title under which the possession is held and the ownership claimed. *Georgia v. South Carolina*, 497 U.S. at 393; *Landes v. Brandt*, 51 U.S. (10 How.) 348, 375 (1850).

9. Inaction by a state may itself constitute acquiescence. *Georgia v. South Carolina*, 497 U.S. at 393 ("[I]naction alone may constitute acquiescence when it continues for a sufficiently long period. See *Rhode Island v. Massachusetts*, 15 Pet. 233, 274 (1841); *Vermont v. New Hampshire*, 289 U.S. at 616 (1933).").

b. Respondents' record evidence relating to the Rule of Acquiescence

As indicated above, there are various factors to consider under the Rule of Acquiescence. Respondents submit that the record evidence, considered in light of those factors, demonstrates that the Disputed Area constitutes Mississippi land.

Unchallenged Patents Stack Island was patented as land located in Issaquena County, Mississippi. It may reasonably be concluded from this that both the officials of the United States and the patent applicant regarded the land as being located in Mississippi. Prior to its intervention in *Houston v. Thomas* in 1987, Louisiana had taken no action to contest Mississippi's sovereignty or challenge

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interpretation of and conclusions arising from the 1826-1827 township maps showing Island No. 94 within the boundaries of Mississippi. [Exhibit P-1]

the Houston Group's title. [*See* Exhibits P-6, P-7, P-41, and P-SE-20.]

Taxes The record shows that as early as 1889, the year following the Blackwell patent, and continuously thereafter, taxes have been assessed by and paid to Issaquena County, Mississippi with regard to the Disputed Area. In evidence as Exhibit P-64 is an affidavit of the Issaquena County Chancery Clerk regarding the assessment and payment of taxes during this 100 year period, together with copies of available assessment rolls and tax receipts. In 1929, Mississippi enforced its tax laws through foreclosure and conveyed the island to the predecessor of the Houston Group in 1933. [*See* Exhibit P-46.] Mississippi has continued to assess taxes on the Disputed Area, and the Houston Group has continued to pay taxes on the Disputed Area.

Exercise of Civil and Criminal Court Jurisdiction Both state and federal courts in Mississippi have exercised jurisdiction over controversies involving the Disputed Area. Exhibit P-60 is a copy of the final judgment rendered in the United States District Court for the Southern District of Mississippi in the case of *Houston v. United States Gypsum Co.* in August 1979. This judgment is the subject of separate opinions reported by the Fifth Circuit. *See, e.g., Houston v. United States Gypsum Co.*, 569 F.2d 880 (5th Cir. 1978), *appeal after remand*, 652 F.2d 467 (1981).[36] There are numerous other examples of

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[36] It is not contended that Louisiana is bound by the Fifth Circuit's decision in *Houston v. United States Gypsum Co.*, 569 F.2d 880 (5th Cir. 1978). The decision, however, is evidence of the general recognition of the island as Mississippi land, as well

Mississippi-based courts exercising jurisdiction over the Disputed Area. [*See* Exhibits P-53, P-58, and P-65.][37] There is no evidence in the record of any Louisiana court having undertaken to exercise any jurisdiction over any litigation regarding the Disputed Area.

Township Surveys The 1826-27 United States General Land Office township survey [Exhibit P-1] clearly identifies a land mass located near the Mississippi mainland as Stack Island. The field notes to this early survey by the United States Surveyor clearly refer to the foot of Stack Island as the survey is being made along the Mississippi shore. [Exhibit P-SE-7] The 1828-1829 United States General Land Office survey map, reflecting what is now East Carroll Parish, Louisiana, does not show Stack Island or

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as an example of the exercise of jurisdiction by Mississippi-situated courts. The payment of taxes to Mississippi authorities over a long period of time is specifically mentioned. 569 F.2d at 885. The opinion in that case provides a touch of irony worth noting: "We begin with 'Stack Island' in the Mississippi River, *so identified in the original 1826 United States Land Survey* (platted as 'Island No. 94' by the government in 1881)." 569 F.2d at 881 (emphasis added). Specifically addressing an issue present here, the Fifth Circuit observed, "An avulsion does not change the boundary. Hence, *all the territory involved in this controversy is in Issaquena County, Mississippi*, even though Stack Island is now west of the main channel of the Mississippi River." 569 F.2d at 881 n.2 (emphasis added). Louisiana did not raise any question with respect to this conclusion. It did not advise Mississippi that it regarded this observation of the Fifth Circuit as being incorrect. Instead, Louisiana maintained its long-continued silence until its intervention in *Houston v. Thomas*.

[37] *See also* the testimony of Bill Marshall contained in the transcript of the testimony before the district court, pages 226 through 229.

any other islands along the Louisiana shore. [*See* Exhibit P-2.]

Acts and Recognitions of State Officials and Others As early as 1827, individuals in the area considered Stack Island as part of Mississippi. [*See* Exhibit P-SE-8, 1847 edition of *Vicksburg Weekly Sentinel*.] This ancient newspaper article published in 1847 regarding an 1827 event tends to show that the Indian residents of Stack Island regarded the island as being subject to the jurisdiction of Mississippi. In 1881, Stephen B. Blackwell made application for a homestead patent from the United States of America. [*See* Exhibit P-SE-41.] This file shows that, in at least 1881, the general reputation was that Stack Island was part of Mississippi.

One of the most conclusive indications that Louisiana did not consider Stack Island to be within its jurisdiction is found in the 1907 island survey by the Fifth Louisiana Levee District. That survey did not include Stack Island among the islands surveyed and claimed by Louisiana. The 1907 survey is Exhibit LA-37-A1 and is referred to in *State ex rel. Board of Commissioners for the Fifth Louisiana Levee District v. Capedeville*, 54 So. 820 (La. 1911). A comparison of Exhibit LA-37-A1 (the 1907 survey) and P-17 (a 1908-1909 survey of the Mississippi River Commission) reflects that Stack Island was not among the islands surveyed and claimed by Louisiana.[38]

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[38] The survey was undertaken pursuant to Act No. 44 of 1886 of the Louisiana legislature, by which Louisiana granted to the Fifth Louisiana Levee District "all lands embraced in the original grants by Congress for levee and drainage purposes that are located in the parishes of the Fifth Louisiana Levee

Exhibit P-98 confirms that Louisiana did not claim jurisdiction over Stack Island at that time. In Exhibit P-98, the Louisiana Registrar of the State Land Office made reference to all islands claimed by the Fifth Louisiana Levee District that were to be surveyed and indicated that the Levee District would request a patent to be issued with regard to the islands claimed by Louisiana. No claim was made to Stack Island.

In the 1970's, the Lake Providence Port Commission investigated its claim to Stack Island and determined that it had no claim to or interest in the "accretion area lying along the Louisiana shore immediately south of Stack Island." [*See* Exhibits P-83 and P-112.] During this same period of time, the Louisiana Department of Public Works investigated Louisiana's potential claim to the Disputed

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District and are subject to overflows" and also all lands forfeited or sold to the state for taxes. In 1908, by Act No. 191, the legislature amended the granting clause of Act No. 44 of 1886 by adding the following words: "also, all other lands situated in said district belonging to the State of Louisiana be and the same are hereby granted to said Board of Commissioners, provided this Act shall not apply to internal improvement lands or any lands reserved to the State for school purposes." *State ex rel. Board of Commissioners for the Fifth Louisiana Levee District v. Capedeville*, states:

> As the records show that, in the year 1907, the said islands were surveyed by the State Board of Engineers at the expense of the Levee District, it is probable that Act No. 191 of 1908 was passed for the purpose of vesting title to these lands in the plaintiff board. The grant in said Act is broad enough to cover said islands, unless they fall within the exception of lands reserved to the State for school purposes.

Area but never asserted any claim. [*See* Exhibits P-80 through P-84, P-87, P-88, P-90, P-91, and P-92.]

The stipulated record contains evidence that officials of Issaquena County, Mississippi have asserted criminal jurisdiction. By contrast, persons charged with game violations have been delivered by Louisiana officials to Mississippi officials for prosecution. Louisiana State Police, in carrying out reconnaissance operations for marijuana patches on Stack Island, have not attempted to exercise jurisdiction but, rather, have notified the Mississippi Bureau of Narcotics of such findings and left it to Mississippi to issue appropriate search warrants and take enforcement action. Louisiana authorities, having arrested suspects on the island, turned such suspects over to Mississippi Bureau of Narcotics agents, and such suspects were prosecuted in Mississippi by Mississippi officials. [*See* P-65; Tr. 213-15, 218; Bill Marshall's testimony at Tr. 226-29.] Louisiana officials have declined to exercise jurisdiction on the island. [J.A. 78, 82-84, 86][39]

Reputation and Treatment by Private Citizens In addition to the recognition by public officials that Stack Island was within Mississippi, the record reflects substantial proof from private individuals in the area that supports the fact that Stack Island is located in

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[39] There are numerous deeds, other evidences of ownership, and recognitions of individuals and state officers concerning the ownership of Stack Island. In 1933, the State of Mississippi conveyed by forfeited tax patent all of Stack Island to the Houston Group's predecessor in title. [Exhibit P-46] [*See also* Exhibits P-40 through P-66 and Exhibit P-SE-20 (which is the United States General Land Office file obtained from the National Archives).]

Mississippi.[40] The record, while not undisputed in this regard, shows that private citizens have for many years regarded the Disputed Area as Mississippi land and have understood it to be within the State of Mississippi.

Inaction by Louisiana Louisiana was on notice of Mississippi's claim to Stack Island by, *inter alia*, the 1826-1827 and 1828-1829 United States township surveys, the 1881 Department of Interior General Land Office map showing Island No. 94 in Mississippi, the 1881 Stephen Blackwell patent application, the 1888 patent by the United States to Stephen Blackwell of Island No. 94 as Mississippi lands, the 1933 deed from Mississippi to the Houston Group, the Fifth Circuit litigation in 1976 (*Houston v. United States Gypsum, supra*), and the possession of the various claimants, including the Houston Group, extending over a period of more than 100 years. *See Georgia v. South Carolina, supra* (events putting Georgia on notice of South Carolina's exercise of sovereignty). These events include use and occupancy by individual claimants. The Court cited the early case of *Landes v. Brandt*, 51 U.S. (10 How.) 348, 375 (1850), for the rule that cultivation, taxation, and possession constitute notice not only of the possession itself but of title under which the possession is held.

> "It is conclusively settled in England, that open and notorious adverse possession is evidence of notice; not of the adverse holding only, but of the title under which the possession is held. . . . And in the United States we deem it to be

[40] *See* Tr. 46, 81, 97, 137 through 138, 144 through 146, 226 through 229, 242 through 243, 250, and 252.

> equally settled." *Landes v. Brandt*, 10 How. 348, 375 (1851).

497 U.S. at 393. Louisiana asserted no claim to Stack Island until the filing of its Third Party Complaint against Mississippi in *Houston v. Thomas*.

c. Except to argue its "disappearing island" theory, Louisiana effectively conceded acquiescence

In its briefing before the Special Master, Louisiana's only answer to the acts of acquiescence detailed above was simply to argue that the Disputed Area was not around until the 1950's. Louisiana's position and representations regarding acquiescence – *i.e.* the Disputed Area did not exist until the 1950's – have some curious inconsistencies. At page 31 of its brief before the Special Master, Louisiana asserts that the Delony family "has lived on the property since before the turn of the century." Similarly, at page 32, Louisiana asserts that Mr. Wyly has been "hunting and fishing, swimming, etc." on the accreted area "commencing sixty (60) years ago." Louisiana does not explain how the Delony family or Mr. Wyly could do this since – according to Louisiana – the Disputed Area did not even come into existence until several decades later. The answer, of course, is that neither the Delony family nor Mr. Wyly had anything to do with the Disputed Area; their activities took place elsewhere.[41]

[41] This is confirmed by Louisiana's careful use of vague terms such as "property," "accreted area," etc., rather than the defined term "Disputed Area."

Louisiana has no answer to the acts of acquiescence detailed by Respondents. The conduct proffered by Louisiana in support of its purported involvement with the Disputed Area occurred in the recent past, long after acquiescence. Accordingly, Respondents submit that, under the Rule of Acquiescence, as well as under the Rule of the Thalweg and the Island Rule, the Disputed Area constitutes Mississippi land.

RESPONSE TO REQUEST FOR NEW TRIAL

In its Exceptions, Louisiana has requested a new trial of the supplemental hearing before the Special Master.[42] However, Louisiana has not offered a single reason why a new trial is necessary or even helpful. Accordingly, it is respectfully submitted that Louisiana's request to start over yet another time should be denied.

CONCLUSION

For the foregoing reasons, Mississippi and the Houston Group request that the recommendations of the Special Master be approved and adopted; that the interstate boundary in the vicinity of the Disputed Area be established as set out in Appendix A to the Final Report

[42] At page 29 of its Exceptions, Louisiana makes reference to Fed. R. Civ. P. 52 and the clearly erroneous standard. Respondents do not believe that, in the context of an original action, this Court's review of the Special Master's recommendations is subject to Rule 52.

of the Special Master; and that Louisiana's prayer for cancellation of the Houston Group's title be denied. Respondents request that the decree set out in Appendix E be entered as the judgment of this Court.

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